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Modeling Class Actions: The Representative Suit as an Analytic Tool

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I. INTRODUCTION

From their origins until the present date, class actions have rested on the assumption that those within the class shared a commonality of interest. When the class is sufficiently cohesive, the named representative may appropriately litigate the interests of the entire class. American law generally holds that when a properly structured class action is resolved by a judicial judgment, the entire class is bound. This feature—the binding effect of a class judgment—has made the class action a useful, if controversial, device for compacting within one suit dozens or even hundreds of individual actions. There are, however, trade-offs. For example, most individuals within the class ("unnamed" or "absent" members) have little or no control over the manner in which the class action is conducted. They thus may find themselves subject to a judgment in a suit in which their personal voices were limited or unheard.

Since the 1966 amendments to Federal Rule of Civil Procedure 23 ("Rule 23"), there has been relentless academic debate and increasing judicial disagreement over the res judicata effects of class action judgments. In particular, arguments have centered around the question of binding absentee class members.[1] In one sense, the debate is ironic, considering the care with which the Advisory Committee for the 1966 amendments to Rule 23 addressed the extent and effect of class action judgments. It is abundantly clear that the Advisory Committee intended that unnamed members be bound when a class has been accurately certified and properly maintained throughout the suit.[2] That

1. *See* Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 705-06 (1994) (criticizing the Circuits for employing res judicata standards in the class action context that are "uncertain" or even "irrational"); Linda S. Mullenix, *Getting to* Shutts, 46 U. KAN. L. REV. 727, 736-48 (1998) (describing and criticizing the post-*Shutts* "mischief" among the circuits and within the Supreme Court); Barbara A. Winters, Comment, *Jurisdiction over Unnamed Plaintiffs in Multistate Class Actions*, 73 CAL. L. REV. 181, 181-83 (1985) (noting disagreement in commentary and in the judiciary over issues surrounding preclusion in the multi-state class action context, pre-*Shutts*); *see also* 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1757 (2d ed. 1986). *See generally* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148 (discussing disagreement in recent cases over a court's authority to issue injunctions against unnamed class members).

2. First, the Advisory Committee identified the "proper extent of the judgments" as one of the points to clarify in its 1966 revision of Rule 23. *See* FED. R. CIV. P. 23 advisory committee note. Second, the Committee simply stated that "The amended rule . . . provides that all class actions maintained to the end . . . will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class." *Id.* Third, except for the special provision allowing "opt-outs" in class actions certified under Rule 23(b)(3), the Committee never cast doubt on the binding effect of properly conducted class actions. *Id.*

said, however, the Advisory Committee paid little heed to articulating a sound theoretical basis for binding unnamed class members. Of course, the Committee did not foresee the frequency and magnitude of modern damage actions involving loosely bound class members scattered across many states. Unfortunately, the Supreme Court's opinion in the leading case of *Phillips Petroleum Co. v. Shutts*[3] brought little clarity to the debate surrounding the reach of class action judgments.

In *Shutts*, a class of oil royalty owners sued Phillips Petroleum, a Kansas corporation, in a Kansas state court.[4] One class representative was a Kansas resident who owned Kansas land on which Phillips Petroleum was drilling for oil; another representative was an out-of-state owner of Kansas land.[5] However, the vast majority of unnamed class members were from states other than Kansas and had no affiliations with the forum state.[6] Instead of focusing on the analytical basis for binding absent class members, the Court became preoccupied with its response to Phillips Petroleum's personal jurisdiction argument. Phillips contended that absent plaintiff class members without minimum contacts with the forum state would be deprived of due process if the Kansas court were able to bind them by its judgment.[7] Ultimately, the Court rejected Phillips' position on the ground that since the class suit in question was the equivalent of a Rule 23(b)(3) action, it sufficed that the unnamed class members had been afforded the opportunity to "opt out."[8] Thus, those members who voluntarily remained in the plaintiff class were bound by reason of their consent to personal jurisdiction.

The *Shutts* holding is sound enough—the judgment was binding as long as absent class members could choose to leave the class and, if they declined, received adequate representation. The *International Shoe*[9] overtone of the opinion, however, has led to difficulty. The *Shutts* opinion can be read as saying that a central consideration (perhaps *the* central consideration) in determining the effect of a class action judgment on an absent class member is whether she has an individual affiliation with the forum state sufficient to support in personam jurisdiction. Thus, even though the Court was careful to point

3. 472 U.S. 797 (1985).
4. *Id.* at 799.
5. *Id.* at 800-01.
6. *Id.* at 801.
7. *Id.* at 806-14.
8. The Court asserted that the failure of absentees to opt out, whether or not they were within the jurisdiction, was proof of their consent to the Kansas court's power over their claims. *See id.* at 812-13.
9. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310 (1945) (holding that territorial (personal) jurisdiction may be exercised over parties who have minimum contacts with the forum state).

out that it was addressing only the Rule 23(b)(3) action before it,[10] one could extrapolate from the *Shutts* opinion the general proposition that binding unnamed class members is dependent on the existence of an adequate basis of personal jurisdiction such as presence, minimum contacts, or consent.[11]

This proposition, if accepted, would emasculate the utility of class actions. It would also reject the historical model of class actions, which portrays class suits as a specific variety of representative actions. As such, it is the relationship between the representative (over whom the court has jurisdiction) and the absent class member that establishes the res judicata effect of a class judgment. Representation is a surrogate for personal jurisdiction. To emphasize issues of individual personal jurisdiction not only obscures the accepted structure of class actions, but also deflects attention from the central considerations in such suits. The core inquiries in all class actions are, first, the assessment of the cohesiveness of the class and, second, the evaluation of representational adequacy by the named class members and class counsel.

Even though the *Shutts* decision is ostensibly confined to class actions under Rule 23(b)(3) and its state counterparts,[12] the Court's opinion has nonetheless spawned uncertainty and disagreement in a variety of contexts. An issue of critical importance is whether an absent, non-resident plaintiff who lacks sufficient contacts with the forum state is bound in so-called "mandatory" actions under Rule 23(b)(1) or (b)(2). Persons within classes formed under these subsections of Rule 23 are not afforded an opportunity to leave the class and possibly pursue an individual action. The status of absent plaintiffs in mandatory class actions would have come before the Supreme Court in *Ticor Title Insurance Co. v. Brown*,[13] but the Court dismissed the case on the ground that certiorari had been improvidently granted.[14] The Ninth Circuit Court of Appeals had ruled in *Ticor Title* that in a "hybrid" suit—one seeking both equitable relief and substantial money damages under Rule 23(b)(1) or (b)(2)—absent, non-resident

10. *See Shutts*, 472 U.S. at 804 n.3. The Kansas class action rule was modeled after Rule 23.

11. Professor Monaghan criticizes the *Shutts* Court for its focus on the differences between defendants—the traditional subjects of personal jurisdiction concerns—and absent plaintiff class members, a focus which gives the appearance of satisfying the due process concerns raised by petitioners in the case through an "implied consent" rationale. *See* Monaghan, *supra* note 1, at 1166-70.

12. *See supra* note 10 and accompanying text.

13. 511 U.S. 117 (1994).

14. *See id.*

plaintiffs must be afforded the opportunity to opt out.[15] If they are not allowed this option, their damage claims remain viable.

In this Article, I begin in Part II by documenting the proposition that class suits are properly viewed as a subset of representative lawsuits. Case law demonstrates that class actions remain true to the historical and doctrinal roots of the representative suit. As such, class actions should be analyzed in much the same way as are other representative suits, with the important exception that special account must be taken of several important differences between class suits and other kinds of representative actions.[16] The recognition that class actions constitute a special subset of representative actions is essential not only to the proper resolution of traditional, straightforward issues of personal jurisdiction, but also critical to the binding effects of settlements as well as other class action issues. I next trace the ramifications of the representative model of class litigations with particular emphasis on the res judicata effects of class action judgments. Specifically, in Part III I discuss the similarities and differences between the traditional representative suits, on the one hand, and class actions—especially modern class actions—on the other. This Part then goes on to show how Rule 23 is crafted to bridge the gaps between traditional representative suits and class suits. From this analysis, I conclude that, if properly administered, Rule 23 and state rules modeled after it are constitutional as written.[17] It is essential, however, that these rules be administered with proper regard for the representative model in its modified "class action" form. Part III concludes by showing why the defendant class action, often debated in the literature, should seldom cause either constitutional or practical concern. Finally, in Part IV, I analyze particular issues growing out of the anti-suit injunction and preclusion by judgment. Here especially, the representative model comes into tension with traditional limits on

15. 982 F.2d 386, 392 (9th Cir. 1992). Other recent decisions by the Supreme Court could have lent some guidance as to the binding effect of mandatory class actions, but the Court declined to broach this issue. *Oritz v. Fibreboard Co.*, 527 U.S. 815 (1999), *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612 (1997), and *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), all afforded the Court an opportunity to formulate a workable theory of res judicata in the class action context, but the Court failed to take full advantage in any of these cases.

16. For a description of the representative model, see Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 IND. L.J. 597, 599 (1987). Professor (now Judge) Wood contributes thoughtful insights into the problems of modern class actions by constructing a sliding scale of cohesiveness and using concepts of sovereign adjudicatory power and individual liberties to dictate when courts rely on the representative model. *See also infra* note 89.

17. A leading case book reports that roughly two-thirds of the states have patterned their class action rule after Rule 23. ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION CASES AND MATERIALS 439 (2000).

judicial power. Generally speaking, if the representative-class model is respected, one forum ("*F1*") is not empowered to prevent an absent class member from challenging, in the forum of her choice ("*F2*"), an *F1* class judgment based on her contention of inadequate representation. Nor should a forum court entertaining a class action seeking primarily equitable relief ordinarily be able to preclude individual damage claims in other jurisdictions.

The first task, however, is to show that the representative model is historically and analytically sound, that it lies at the core of modern class actions, and that one of its principal themes is its binding effect.

II. THE REPRESENTATIVE MODEL: A BRIDGE TO THE TWENTY-FIRST CENTURY

A. Historical Roots of the Representative Model

There seems to be little doubt that, historically, class actions have been viewed as simply a special variety of representative suits. One commentator finds the characterization so generally accepted that she casually remarks, "It is hornbook law that class-action litigation is, by nature and definition, representational litigation."[18] Indeed, it appears that the leading treatise authorities have uniformly viewed the class action as a subset of representative litigation.[19] Professor Herbert Newberg, for example, describes the structure of the class action as a representative suit on behalf of others similarly situated.[20] He goes on to note that because of its representative character, the class action is an atypical, or "nontraditional" form of litigation.[21] Accordingly,

> [t]o understand what makes class actions tick, it is important to analyze the basic nature of class actions, their fundamental characteristics and effects, and why they exist in modern jurisprudence. When these aspects of class actions have been analyzed, questions about what process is due for the protection of absent class members, and how their *represented* status is reconciled with traditional litigation rules and principles, can be addressed in a reasonably settled and consistent manner.[22]

To trace the history of the class action, in fact, is to track the history of representative or group litigation. Traditionally, legal historians have traced the roots of the class action to the Bill of Peace, which originated in seventeenth-century English chancery courts.[23] Recently, Professor Stephen C. Yeazell has challenged this traditional

18. Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV 871, 884 (1995).
19. *See, e.g.*, 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS §§ 1.01-1.11 (1992); 7A WRIGHT ET AL., *supra* note 1, § 1753.
20. *See* 1 NEWBERG & CONTE, *supra* note 19, § 1.01.
21. 1 *id.*
22. 1 *id.* (emphasis added).
23. *See* ZECHARIAH CHAFEE, SOME PROBLEMS OF EQUITY 157-164 (1950).

view by mustering historical evidence that group litigation developed gradually as an outgrowth of communal harms within English feudal social structures.[24] Yeazell cautions, therefore, that the history of group or representative litigation is not seamless, but rather follows the contours of social history and political ideology.

Even if Yeazell's view is accepted, medieval group litigation gave form to the model of judicial representation as an alternative to typical "self-asserted" lawsuits. Although the early representative suits, whether in feudal tribunals or chancery courts, may have relied for legitimacy on preexisting relationships between the representative and the represented,[25] it is still true that these early English procedural devices developed into the modern class action and gave rise to the core concept of class cohesion. By the nineteenth century, groups given access to courts under representational procedural forms included creditors, legatees, unincorporated associations, and specified groups with interests in real property.[26] These various associated litigants constituted both plaintiff and defendant classes.[27] Moreover, American judges and legal scholars incorporated into nineteenth-century doctrine the principles that justify representative legitimacy, thus laying the groundwork for the 1938 Federal Rule governing class actions.[28]

The Supreme Court's early conception of class actions confirms both their representative nature and their endemic characteristic of a binding judgment.[29] The first notable case legitimizing the class suit was *Smith v. Swormstedt*, decided by the Court in 1853.[30] There, a

24. *See* STEPHEN C. Yeazell, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 41-58 (1987). Professor Yeazell thoroughly discusses the power dynamic, expressed in manorial courts, between medieval village groups and their lords and concludes, "[t]o understand the social and political context of the village cases is to question easy analogies between early group litigation and the modern class action. The differences flow from features of the social organization [of the villages]." *Id.* at 57.

25. *See* Stephen C. Yeazell, *Group Litigation and Social Context*, 77 COLUM. L. REV. 866, 867, 877 (1977).

26. *See* Geoffrey C. Hazard et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849, 1861 (1998).

27. *See* YEAZELL, *supra* note 25, at 880-81; 7A WRIGHT ET AL., *supra* note 1, § 1751.

28. *See* Hazard et al., *supra* note 26, at 1878.

29. In a revealing and scholarly article, Professors Hazard, Gedid, and Sowle show that both English and American courts have taken inconsistent positions on the binding effect of class judgments. *See id.* at 1849-58. My thesis is, however, that in the latter half of the twentieth century—and even before—the Supreme Court and the Federal Rules of Civil Procedure have endorsed preclusion by judgement in class actions.

30. 57 U.S. 288 (1853). *Smith* was preceded by *Beatty v. Kurtz*, 27 U.S. 565, 584-85 (1829), in which the Supreme Court allowed some members of a voluntary association to sue on behalf of all without joinder of all informal members. *Beatty*, however, did not provide for the same far-reaching class framework that *Smith* did.

plaintiff class from the southern branch of the Methodist Episcopal Church sued a defendant class of traveling ministers from the northern branch of the church.[31] The plaintiffs sought their equitable share of a publishing business to which the defendants asserted exclusive ownership. In the course of approving the party structure, the Court articulated the framework for the modern class action. Significantly, Justice Nelson concluded that when the interested parties are numerous and have a common objective in bringing suit, "some of the body may maintain a bill *on behalf of themselves and of the others*; and a bill may be maintained against . . . [a] body of defendants, *representing* a common interest."[32] Other passages in the *Smith* opinion indicate that the Court assumed a valid judgment would be binding on the entire class.[33] For example, the Court stated that "a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court."[34] Finally, the Court's opinion appears to have been highly influenced by Justice Story's *Commentaries on Equity Pleadings*, in which he cited the English Bill of Peace as the ancestor of American class actions.[35]

The first federal class action rule was patterned after existing uses and understandings of the class suit. In the original Rule 23 there were three "categories" of class actions, commonly known as "true," "hybrid," and "spurious." This tripartite scheme, however, proved unworkable. The abstractness and overlapping nature of the so-called "jural" relationships among the three classes blurred the distinctions that supposedly defined them. Furthermore, the spurious class action proved to be of limited practical value because it did not bind absent members unless they intervened. Of course, when the federal class action rule was revised in 1966, the drafters used functional criteria to create the three categories of classes familiarly known as Rule 23(b)(1), (b)(2), and (b)(3). They also included the now-familiar opt-out provision for absent class members, but this escape provision was carefully confined to the least cohesive—(b)(3)—class. As noted earlier, it strongly appears that the Advisory Committee intended all class judgments to be binding on both representatives and absentee class members, with the exception of absentees electing to withdraw under the "opt-out" provisions of (b)(3).[36] This decision by the Com-

31. *See Smith*, 57 U.S. at 288.
32. *Id.* at 301-02 (emphasis added).
33. *See id*; *see also* Hazard et al., *supra* note 26, at 1899-1902; *id.* at 1901-02 (pointing out that Equity Rule 48, the rule in force at the time pertaining to the use of this procedural device in federal courts, did not allow absent class members to be bound by a class judgment).
34. *See Smith*, 57 U.S. at 303.
35. *See* Hazard et al., *supra* note 26, at 1899.
36. *See supra* note 2. The opt-out provision is actually found in Rule 23(c)(2).

mittee is a recognition that although class actions are founded on the representative model, special account must be taken of the unique features of class representation.

B. Modern Doctrine: Personal Jurisdiction Over the Class Representative

Important implications arise from the baseline characterization of the class suit as "representative litigation." For instance, the application of traditional doctrine governing representative suits dictates that, generally, a court must have personal jurisdiction only over the named representative to assert proper jurisdiction over the entire "class" of represented persons.[37] Major twentieth century Supreme Court cases involving class actions, as well as the *Restatement (Second) of Judgments*, support this position.[38] Significantly, the *Restatement* aligns the class action with other kinds of representative suits, such as those filed by a guardian, trustee, or similar fiduciary.[39] The *Restatement's* characterization of the class suits finds support in an early leading case, *Supreme Tribe of Ben Hur v. Cauble*, decided by the Supreme Court in 1921.[40] Here, again, the Court emphatically confirmed the accepted principle that the named class member (the class representative) litigates not only for herself, but for the class as well.

In *Ben Hur*, members of a fraternal benefit association sued the association, a citizen of Indiana, to enjoin the illegal use of trust funds and prevent reorganization of the Supreme Tribe.[41] The plaintiff

37. The old "impracticability" standard allowed courts to assert jurisdiction over represented parties although the courts could not have jurisdiction over them as individuals absent represented status. *See* 1 NEWBERG & CONTE, *supra* note 19, § 3.03; 7A WRIGHT ET AL., *supra* note 1, § 1762; Charles Donelan, *Prerequisites to a Class Action Under New Rule 23*, 10 B.C. IND. & COMP. L. REV. 527, 531 (1969).

38. *See* Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 306 (1950); Hansberry v. Lee, 311 U.S. 32 (1940); Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 (1921); RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e) cmt. f (1972) (stating that a represented person who is beyond the jurisdiction of the court is still bound by the judgment when the court has properly asserted jurisdiction over the representative). Although the *Restatement* also notes that the named class member must be more carefully scrutinized than other types of representatives because the class representative's status is "voluntary and non-contractual," presumably once the representative survives this scrutiny, the traditional doctrinal notions of representation are applied to class actions. In questions of venue, for example, only the convenience of the named representative matters—proper venue for all class members is not required. *See* 7A WRIGHT ET AL., *supra* note 1, § 1757. The same is true of federal subject matter jurisdiction based on diversity—only the citizenship of the named class members is used to determine if "diversity jurisdiction" exists. *See infra* text accompanying notes 44-47.

39. RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(e)(1) (1972).

40. 255 U.S. 356 (1921).

41. *See id.* at 360-61.

class, however, included unnamed class members who shared a common citizenship with the Indiana defendant, thus possibly destroying diversity.[42] After the defendant prevailed on the merits, some of the unnamed members, all Indiana citizens, filed separate class suits, contending that they could not be bound by the judgment in the earlier class action. They argued that since subject matter jurisdiction in the original class suit was based on diversity, their inclusion as class members would have destroyed complete diversity. The narrow question in *Ben Hur*, then, was jurisdictional: whether a district court can assert subject-matter jurisdiction in a case founded on diversity when some unnamed members of the plaintiff class share the defendant's citizenship.[43] Noting that the early case of *Stewart v. Dunham*[44] was controlling, the Court held that diversity jurisdiction was not destroyed so long as there was complete diversity between the class representatives and the defendant.[45] Especially noteworthy is the following passage, in which Justice Day characterized the case before the Court as

> peculiarly one which could only be prosecuted by a part of those interested suing for all in a representative suit. Diversity of citizenship gave the District Court jurisdiction. Indiana citizens were of the class represented; *their rights were duly represented by those before the court.* The intervention of the Indiana citizens in the suit would not have defeated the jurisdiction already acquired.[46]

Justice Day then reiterated the point, suggesting that all the parties had their day in court:

> The parties and the subject matter are within the court's jurisdiction. It is impossible to name all of the class as parties, where, as here, its membership is too numerous to bring into court . . . . The parties bringing the suit *truly represented* the interested class. If a decree is to be effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree.[47]

Thus, although *Ben Hur* holds only that subject-matter jurisdiction over the main claim is established by the respective citizenships of the class representatives and the defendant(s), the Court's emphatic assertion that the absent class members were "truly represented" and "concluded by the decree" is both a clear endorsement of the representative model and a strong indication that those "truly" represented will be bound. It remained to be seen, however, whether internal conflicts and tensions within the class can so weaken the prototypical representative model that it can no longer be sustained.

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42. *See id.*
43. *See id.* at 360.
44. 115 U.S. 61 (1885).
45. *See Ben Hur*, 255 U.S. at 365-67.
46. *Id.* at 366 (emphasis added) (citing *Stewart*, 115 U.S. 61).
47. *Id.* at 367 (emphasis added).

Hansberry v. Lee[48] is the next major and, perhaps, the seminal class action case to reach the Supreme Court. The case involved the res judicata effect of a state court decree, on behalf of a plaintiff class, enforcing a racially restrictive covenant affecting a neighborhood in Cook County, Illinois.[49] Some five years after this initial suit, another class suit was filed, this time seeking enforcement of the covenant against different parties, including the Hansberrys, who were minority purchasers. The defendants asserted that the restrictive covenant was invalid for the reason that it had never been properly and lawfully adopted by the landowners. This defense was rejected by the Illinois state courts on the ground the issue of validity was concluded by the first class suit in which the present defendants had been represented as (plaintiff) class members. The Court decided that even though the *Hansberry* petitioners might be embraced within the purported plaintiff class, the petitioners nonetheless were not bound by the prior judgment if their interests significantly diverged from those of the class representative and other class members. In essence, the representative model failed because the class in the first suit lacked the cohesion essential to a binding class action.

However, as to the history and theory of the class suit, the *Hansberry* Court remarked:

> It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or *to which he has not been made a party by service of process* [citing *Pennoyer v. Neff*]. A judgment rendered in such circumstances is not entitled to the full faith and credit which the Constitution and statute of the United States prescribe, and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires [sic].
>
> To these general rules there is a *recognized exception* that, to an extent not precisely defined by judicial opinion, the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it. [citing, among other cases, *Smith v. Swormstedt*].[50]

For present purposes, the importance of this dictum is obvious. Not only is the class action a representative suit, but the essential nature of a properly framed suit permits a court to bind absent class members even though they are not subject to service of process.[51] In the same vein, the Court went on to note that "[i]t is familiar doctrine in the

48. 311 U.S. 32 (1940).

49. *See id.* at 37.

50. *Id.* at 40-41 (emphasis added) (citations omitted).

51. At another point in the *Hansberry* dicta, the Court noted that the class suit is like a host of other types of litigation where

> courts are . . . called upon to proceed with causes in which the number of those interested in the litigation is so great as to make difficult or impossible the joinder of all or *because some are not within the jurisdiction* or because their whereabouts is unknown or where if all were made parties

federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present."[52] State courts, too, said the Court, are free to fashion class action rules that bind absentees, subject only to the constitutional restraint that the "procedure adopted fairly insures the protection of the interests of absent parties."[53]

Finally, additional evidence of the Court's consistent position regarding the framework of class suits may be found in *Matsushita Electric Industrial Co. v. Epstein*,[54] a 1996 case in which the Court, quoting favorably from the decision below, reiterated the basic proposition that "all members of the class . . . are bound by the [class] judgment . . . unless, in a Rule 23(b)(3) action, they make a timely election for exclusion."[55] It thus seems plain enough that throughout the history of the modern class action in the United States, the Supreme Court has accepted the binding effect of the class judgment on absentees.

III. THE REPRESENTATIVE FRAMEWORK AND RULE 23

A. Representative Suits Generally

The category "representative litigation" embraces a range of suits, including, for example, those by trustees, executors, administrators, conservators, guardians, various fiduciaries, unincorporated associations, and (as we have seen) class representatives.[56] Prototypical representative suits tend to share a number of important characteristics, although there are occasional exceptions and qualifications.[57] The representative usually sues not on behalf of herself, but only on behalf

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> to the suit its continued abatement by the death of some would prevent or unduly delay a decree.

311 U.S. at 41 (emphasis added). Barbara A. Winters argues that this phrase does not mean the Court meant that the Court can extend its jurisdiction by way of the class suit, but rather simply means that the person is not located in the jurisdiction at the time. *See* Winters, *supra* note 1, at 196. However, other comments in dicta as well as the tone of *Hansberry* cast doubt on this position.

52. *Hansberry*, 311 U.S. at 42-43.
53. *See id.* at 43.
54. 516 U.S. 367 (1996).
55. *Id.* at 367 (citing HERBERT NEWBERG, CLASS ACTIONS § 2755 (1977)).
56. Representative suits may also include so-called "virtual representation," although this is not a traditional kind of representative lawsuit. "Virtual representation" is a doctrinally suspect method of precluding absent third parties unaware, ex ante, that certain litigation would preclude them from bringing their own claims or defending themselves directly. *See generally* 18A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4457 (2d ed. 2002); Jack L. Johnson, *Due or Voodoo Process: Virtual Representation as a Justification for Preclusion of the Nonparty's Claim*, 68 TUL. L. REV. 1303 (1994).
57. *See* 18A WRIGHT ET AL., *supra* note 56, § 4455.

of the represented party. The pleadings clarify, at the beginning of the litigation, that the action is representative in character.[58] Moreover, the representative usually is not bound personally by the judgment issued for or against her charge because she asserts no personal claim or defense in the action.[59] Next, most representative relationships originate in preexisting relationships between the representatives and the represented. The presence of such relationships suggests common interests and, perhaps in many instances, prelitigation knowledge that is mutually shared. Furthermore, the nature of these relationships is, broadly speaking, consensual. Depending on the circumstances, consent of the represented parties or of an appropriate judicial body sympathetic to the wishes of the represented parties may be required.[60] Finally, the representative typically has a fiduciary obligation to her charge, and she may be held liable for a breach of that duty.[61] This potential liability provides at least one incentive (often, of course, there are others) for the representative to prosecute vigorously the claims or defenses of her charge.[62]

B. Class Actions as Representative Suits

Class actions differ from typical representative suits in certain significant respects. These differences may pose questions in several distinct litigation contexts, thus suggesting that the answers are often contextual. For example, the issue of whether a class action structure alters the usual rule governing necessary parties is analytically distinct from the question of whether absentees are bound by a class judgment. In any event, the difference between class actions and typical representative suits prompted the authors of a leading treatise to describe the class action as "more modern and less certain" than traditional representative suits.[63] Note that in many modern class actions, the class representative and absent class members have no relationship prior to the suit, thus decreasing the likelihood that the represen-

58. *See* 18A *id.* § 4454.
59. *See* 18A *id.*
60. *See* 18A *id.*
61. *See* 18A *id.*
62. For example, in the course of his representation, the fiduciary may develop obligations or acquire rights of action of his own, apart from his role as representative. In such cases, the representative's own cases may be joined with the case of the principal or decedent for trial, although they remain analytically distinct. A fiduciary is generally not liable for the performance of a contract entered into as a representative unless he deceived the other party about his representative capacity. Additionally, failure to differentiate between the individual and representative nature of the action in pleading is generally susceptible to amendment and is not fatal as long as the nature of the suit is clear in context. *See, e.g.*, 2 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, NEW YORK CIVIL PRACTICE § 11-4.1.1 (1992).
63. *See* 18A WRIGHT ET AL., *supra* note 56, § 4455.

tation is implicitly or explicitly consensual. In short, the litigated event often gives form to the contours of the class. Furthermore, unlike the usual representative or fiduciary, the class representative sues on her own behalf as well as on behalf of the absentees.[64] Some observers note that the so-called "personal stake" requirement[65] in itself usually ensures adequate representation because the named class member's stake in the claim triggers self-interested behavior, thus ensuring the vigorous prosecution (or defense) of class claims.[66] That proposition, however, is likely to be true only in cases where the representative's personal claim is substantial. Furthermore, in cases where the class representative's claim is large, there is a risk that he might favor his own claim (for example, by the terms of a settlement) over the claims of unnamed members.[67]

C. Binding the Absentee: Class Cohesion and Judicial Oversight

Although distinguishable in some important respects from the typical representative lawsuit, a properly executed class suit still oper-

64. Some commentators have argued that it is precisely the self-interest of the class representative that ensures absentees adequate representation or due process. *See* Gilbert J. Birnbrich, *Forcing Round Classes into Square Rules: Attempting Certification of Nicotine-Addiction-as-Injury Class Actions Under Federal Rule of Civil Procedure 23(b)(3)*, 29 U. TOL. L. REV. 699, 706 (1998); Downs, *supra* note 1, at 658. Many courts, however, have described class representatives as "fiduciaries," which necessarily implies a duty beyond self-interested behavior. *See, e.g.*, Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 880 (7th Cir. 2000); Transpac Drilling Venture v. Comm'r of Internal Revenue, 147 F.3d 221, 225 (2d Cir. 1998); Sondel v. Northwest Airlines, Inc., 56 F.3d 938 (8th Cir. 1995). *But see* Becherer v. Merrill Lynch, 193 F.3d 415, 434 n.6 (6th Cir. 1999) (stating that "even if class representatives are legally accountable [through a fiduciary duty] to putative members, I would discount the legal relationship that flows solely from the class relationship. To do otherwise is to penalize attempted class formation."). The Supreme Court typically has not focused explicitly on the role of the class representative or his relationship with the class, but the Court has described the class representative as a champion who seeks to "vindicate the rights of individuals who otherwise might not consider it worth the candle to embark on litigation in which the optimum result might be more than consumed by the cost." Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980).

65. *See, e.g.*, *Roper*, 445 U.S. at 340; *In re* Milk Prod. Antitrust Litig., 195 F.3d 430, 434 (8th Cir. 1999).

66. For example, "[t]he heart of the rationale that the class representative must adequately represent the class is the notion that the court must be satisfied that the class representative, by litigating his or her personal claim, will also necessarily be litigating common claims that are shared by the class." 1 NEWBERG & CONTE, *supra* note 19, §1.06. Moreover, Professor Newberg cites sources relying distinctly on self-interest arguments. *See* 1 *id.* at n.38.

67. Similarly, large claim plaintiffs in settlement have "much leverage over a group wide deal" possibly leading to their overcompensation. *See* Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227, 243-44 (1999).

ates generally to bind the absent class members to the judgment. In fact, for a class action to function as a useful procedural device, it ordinarily *must* bind absent class members.[68] Some commentators have addressed the imperfections in "representative" class actions by characterizing these actions as something other than representative litigation.[69] This recharacterization is one means of illuminating the peculiar characteristics of class suits, which must be taken account of if class actions are to be properly analyzed and understood. The approach taken here is to begin the analysis with the recognition that representation remains the essence of the class suit, even though class actions have unique features. From this premise, it is readily observed that Rule 23 and other similarly patterned class action rules are designed to compensate for the lack of complete congruence between class actions and other representative suits. In other words, Rule 23 and its state counterparts are structured such that factors other than preexisting relationships, expedited intra-class communication, and traditional fiduciary duties toward a limited number of readily identifiable persons lend legitimacy to class-wide judgments. Several critical phases of a proper class action are designed to ensure that the due process rights of absent class members will remain secure absent the typical features of representative litigation. First, the class action must be structured so that the class represented (and each subclass) is sufficiently cohesive. Second, there must be adequate representation of absent class members throughout the class suit litigation. Third, close judicial monitoring is essential. Finally, in certain situations—namely where a class or subclass is not sufficiently cohesive—notice and an opportunity to opt-out of the suit are required in order to bind absentees to the class judgment. The subsections that follow elaborate these principles. It suffices to emphasize here that the principal responsibility of ensuring that a class action is properly conducted falls upon the court. Neither the parties, nor counsel have incentives that perfectly align with the judicial systems' objectives in permitting class actions. Left to its own adversarial devices, the representative class action is likely to fall short of constitutional adequacy.

68. *See, e.g.*, 18A WRIGHT ET AL., *supra* note 56, § 4455.

69. For example, some have relied on an "entity model" of class suits, which de-emphasizes the role of the "token" class representative and takes class actions as we currently find them—as lawyer-centered litigation where an "entity," rather than an individual, is the true client. *See, e.g.*, David L. Shapiro, *The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917-18 (1998); Edward H. Cooper, *Rule 23: Challenges to the Rulemaking Process*, 71 N.Y.U. L. REV. 13, 26-32 (1996).

1. *The Evolution and Centrality of Class Cohesion*

Class cohesion describes the extent to which the claims, defenses, and injuries "common" to the class are indeed congruent or coincidental.[70] At an early date, courts restricted class suits to the highly cohesive form often described as the "community of interest."[71] In this traditional posture, the class as a *group* laid claim to an "indivisible interest." This tightly knit class may be contrasted with modern classes in which more loosely related individual claims have been aggregated into a single package of litigation.[72] Even though the traditional, narrow view of class appropriateness assured courts of a close identity of legal and factual postures, it proved unduly restrictive. Although it is true that those who can assert a collective right have, essentially, congruent claims, the question in a modern context is how much variance will be tolerated before it becomes impermissible for named parties to represent not only their own interests, but also those of the class. Of course, if wide variation exists in only some aspects of an action, the class can be certified for cohesive issues only.[73] It is not unusual, however, to encounter suits filed as class actions which contain disparate factual and legal postures within the putative class.[74] These loosely cohesive suits are most often found in modern mass torts cases which are usually certified—if at all—under

70. Professor Coffee criticizes the theory that "class cohesion"—or "descriptive representation"—ensures representational adequacy as one which is misguided and focuses too much on loyalty between absentee class member and representative and not enough on controlling agency costs. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000). While I agree that the theory of class cohesion is imperfect, it nonetheless provides a useful theoretical basis for the class action and avoids the need to assess agency costs and other cost-benefit relationships.

71. *See Developments in the Law—Class Actions* (pt. 4), 89 HARV. L. REV. 1318, 1332-37 (1976).

72. *See id.* at 1332.

73. For instance, liability and damages are often separated between the class and individual claims. *See, e.g.*, Berger v. Iron Workers Reinforced Rodmen, Local 201, 170 F.3d 1111 (D.C. Cir. 1999); Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992). *But see* Blyden v. Mancusi, 186 F.3d 252, 268-69 (2d Cir. 1999) (holding that bifurcation of liability and damages stages violated the defendant's Seventh Amendment rights because the second stage allowed the jury to reexamine issues of liability).

74. The story of tobacco litigation in the 1990s shows the problems created when courts certify only minimally cohesive classes in the "mass tort" context. *See generally* Susan E. Kearns, Note, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336 (1999). In fact, mass torts have been the obsession of many, many commentators of class actions—particularly since very few mass tort actions were certified under Rule 23 until the last two decades. For a description of the evolution of mass torts in the class action context, see John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358-64 (1995). A major subject of criticism has been the increasing willingness of courts to certify sprawling, global mass tort cases for settlement purposes only.

Rule 23(b)(3), thus allowing individual members the option of leaving the class. Interestingly, the drafters of the 1966 revision of Rule 23 took the position that mass tort suits should not ordinarily be litigated in the class format.[75] Nonetheless, in recent years, more of these actions have been certified, placing considerable strain on traditional class action principles and practices.

Lack of shared identity among members of the class indicates that some members, if putatively precluded by the judgment, will not have been adequately represented by the named class representatives. Because individuals within the class may have claims or defenses that do not coincide with those of other class members or, more importantly, with those of the representatives, an absentee may face a judgment insufficiently based on the individual issues affecting his litigating posture.[76] While, as noted above, lack of congruence is often found in the mass tort context, the victims of a mass accident sometimes have such congruence of claims or some portion thereof—such as defendant's liability—that a class action structure seems entirely appropriate.[77] Such a case might exist, for example, where numerous hotel guests allege injuries caused when agents of the hotel negligently caused a fire. Here, a class could be appropriately certified on the issue of liability.[78]

The point is that the degree of class cohesion—not the type of suit or even the type of relief sought—is the essential feature in determining when class certification is proper. Indeed, the Supreme Court affirmed this proposition as recently as 1997, when it pointedly remarked that "class cohesion . . . legitimizes representative actions in the first place."[79] The Federal Rule's "prerequisites" to certification of any class—numerosity, commonality, typicality, and adequate representation—seem to overlap for the precise reason that, with the excep-

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See, e.g., Susan Koniak & George C. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1122-30 (1996); Coffee, *supra*, at 1378-83.

75. In their notes, the Advisory Committee for the 1966 revision of Rule 23 speculated that "[a] mass 'accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways." FED. R. CIV. P. 23 advisory committee note. The Committee expected that concerns over cohesion would foreclose any mass tort class action. *See id.*

76. Clearly, to have certain critical issues not presented to the court because such a wide variation exists among the class would be to deny the absentee his "day in court"—albeit through a representative—which the Supreme Court has endorsed as a "deep-rooted historic tradition" in our system of justice. Martin v. Wilks, 490 U.S. 755, 762 (1989).

77. *See, e.g.*, Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986); Haley v. Medtronic, Inc., 169 F.R.D. 643 (C.D. Cal. 1996).

78. *See* Wood, *supra* note 16, at 617. Professor Wood refers illustratively in her article to *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982).

79. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 594 (1997).

tion of numerosity, they attempt to describe the general quality of "cohesion or unity."[80] As noted above, the Supreme Court obscured the cohesion principle in *Shutts* when it apparently based its holding upon personal jurisdiction and the type of relief sought (i.e., damages) rather than class cohesiveness.[81] Unfortunately, several courts of appeals interpreting *Shutts* have likewise elided the principle of class cohesion and have instead drawn bright line standards based entirely on the type of relief sought rather than the nature of the class certified.[82] This is not to say that the kind of relief sought is irrelevant to the issue of class cohesion; it is only to say that the relief sought is not the exclusive factor to consider in addressing the issue of cohesion within a putative class. For example, relief by an injunction instead of damages is often a useful, although rough, proxy for the degree of class cohesion.

In several recent decisions,[83] the Supreme Court has stressed the importance of class cohesiveness in fulfilling the requirements of Rule 23, but has neglected to emphasize the overall structural and theoretical importance of cohesion. For instance, in *Amchem Products, Inc. v. Windsor*, a case in the protracted national asbestos litigation, the Court explicitly linked class cohesion to the predominance requirement of Rule 23(b)(3).[84] The district court in *Amchem* had certified a plaintiff class for settlement purposes without first addressing and satisfying the requirements governing certification for trial. That is, the trial judge certified the class for settlement purposes without heeding the demanding certification requirements imposed by Rule

80. *See* FED. R. CIV. P. 23(a) (1966).

81. *See supra* notes 3-11 and accompanying text.

82. In *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), the Ninth Circuit held that a judgment for injunctive relief in a class action certified under (b)(1) or (2) doesn't prevent subsequent claims for money damages based on same transaction. Likewise, in *Linney v. Cellular Alaska Partnership*, 151 F.3d 1234, 1240 (9th Cir. 1998), the court avoided classifying the (b)(2) action as one "wholly or predominantly" for money damages by valuing the injunctive relief at $20.9 million to $34.2 million and the settlement fund for damages at $6 million. Thus, the objecting plaintiffs' charge that class counsel were inadequate in part because they failed to request opt-out procedures failed because the action could be characterized by the appellate court as primarily seeking injunctive relief. *See id.* The New York Court of Appeals held in *Colt Industries Shareholder Litigation*, 566 N.E.2d 1160, 1166-67 (N.Y. 1991), that *Shutts* did not preclude a mandatory class action which seeks primarily equitable relief, but did find that the New York court could not preclude an absent, nonresident plaintiff lacking contacts with New York from instituting another action for damages in a different jurisdiction.

83. Oritz v. Fibreboard Co., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).

84. *See Amchem*, 521 U.S. at 622-24.

23, sections (a) and (b).[85] Nonetheless, the trial judge did at least determine that the putative class was within subsection (b)(3) of Rule 23, which requires that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members."[86] In upholding the Third Circuit's decertification of the class, the Supreme Court noted the lack of class cohesiveness.[87] It then quoted with approval the appellate court's conclusions that

> [c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma .... Each has a different history of cigarette smoking, a factor that complicates the causation inquiry.
>
> The [exposure-only] plaintiffs especially share little in common, either with each other or with the presently injured class members. It is unclear whether they will contract asbestos-related disease and, if so, what disease each will suffer. They will also incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.[88]

Thus, although the Court correctly emphasized cohesiveness, it appears to do so in the context of the predominance requirement of Rule 23(b)(3). But cohesiveness should not be so confined, for it actually pervades Rule 23 and provides the unifying rationale for its implementation.[89] Its constituent parts are, essentially, commonality of questions of law and fact and typicality of claims or defenses in the sense that the legal and factual postures of the class representatives are typical of the legal and factual postures of the represented class. Implicit in the requirements of commonality and typicality is the absence of conflicts within the class or between the class and the class representative(s).

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85. Specifically, the Supreme Court noted that predominance and commonality of claims and adequacy of representation were severely lacking in the case, which included a sprawling class of present and future claimants injured in a variety of ways. *See id.* at 622-28.

86. FED. R. CIV. P. 23(b)(3).

87. *See Amchem*, 521 U.S. at 623.

88. *Id.* at 624.

89. Professor Wood makes similar suggestions regarding the theoretical utility of the cohesiveness concept. In her framework, the level of cohesiveness determines whether an action fits the representational or joinder model of the class action. *See* Wood, *supra* note 16, at 599-607. Her ideas differ from mine, however, in that she would allow the class action procedural device to encompass more loosely cohesive actions than would I, and in that she conceptualizes due process rights via a sort of "sliding scale" approach based on cohesiveness, whereas I would characterize rights as simply fixed. Professor Coffee, of course, raises objections to emphasizing cohesiveness, *see* Coffee, *supra* note 74, but his analysis may simply be a recharacterization of the problems arising from loosely cohesive classes, particularly since he suggests some similar technical reforms to improve representation and reduce agency costs.

2. *Essential Monitoring Through Judicial Oversight*

Judicial oversight of class litigation is the critical procedural check to keep class suits within the outlines of the representative model and the bounds of due process. Unlike traditional suits (including many representative suits), in which courts allow parties to protect and manage their own interests, class litigation calls upon the judge to actively manage the suit in order to protect the rights of absentees.[90] The unnamed class members did not, after all, choose the class representative(s) to advance their interests in the litigation. Furthermore, it often happens that the class members and the representative(s) had no common membership in a group sharing many similar interests, such as a labor union or a fraternal organization. It thus falls upon the judge, first, to ensure that a class (or subclass) is sufficiently homogenous and, second, to ensure that throughout the suit the class representative(s) vigorously asserts the interests of absentee class members. Obviously, it does not suffice that the class representative has claims similar to the unnamed class members or that other typical class action prerequisites, such as numerosity, are present. These alone do not ensure adequate representation, which depends upon both meeting the necessary cohesiveness of a proper class and faithful and vigorous representation throughout the litigation. The problem of securing and sustaining forceful representation is exacerbated in "small claims" class actions, where the individual value of the litigation to each class member is insubstantial. The risk is that class counsel will not be adequately supervised by the named class members, thus increasing the odds that representation will be desultory and ineffective, or that class counsel will resolve the case in a manner that optimizes attorneys' fees rather than maximizing settlement value to individual class members.[91] In any event, the drafters of Rule 23 pro-

90. Some commentators have criticized the current state of judicial management, or lack thereof, in many class action cases. *See* Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2010-11 (1999) (asserting that even though settlement class actions need strong judicial oversight, implementing a judicial management strategy would be "destined for failure . . . because U.S. judges are ill-equipped for effective inquisitorial judging"); Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS. L. REV. 805, 829 (1997) (remarking that it would be misguided to invest a great deal of trust in judicial control of class suits because "[n]o matter how virtuous the judge, the fact remains that courts are overworked, they have limited access to quality information, and they have an overwhelming incentive to clear their docket [especially via quick settlement]. They cannot reliably police the day-to-day interests of absent class members.").

91. *See* George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 530 (1997); Coffee, *supra* note 74, at 1367-84. For an interesting "case study" on this issue, see Paula Batt Wilson, *Attorney Investment in Class Action Litigation: The Agent Orange Example*, 45 CASE W. RES. L. REV. 291 (1994). *See also* Downs, *supra* note 1, at 661-69 (discussing the

vided a significant measure of judicial oversight for all class actions, including, for example, discretion to the certifying court to create subclasses, to provide notice to class members throughout the litigation and, of course, to decertify a class.[92] In modern class actions, it is critically important that the court assume an active supervisory role.

In at least three recent cases, the Supreme Court has strongly endorsed close judicial oversight.[93] This requirement of careful supervision is, moreover, quite consistent with the Court's historical recognition of the representative nature of class actions.[94] In *Amchem Products, Inc. v. Windsor*,[95] as we have seen, the Court strongly criticized the laxity with which the Eastern District of Pennsylvania certified an asbestos class action settlement. It rebuffed the district court's off-handed rejection of the "strenuous objections" made by absentees at the hearing that preceded settlement approval and the trial court's indifference to creating subclasses.[96] Justice Ginsburg characterized subclassing as an effective tool of judicial management and registered the Court's stern disapproval of the district court's view that "[s]ubclasses were unnecessary . . . bearing in mind the added cost and confusion [such subclasses] would entail and the ability of class members to exclude themselves from the class during the three-month opt-out period."[97] Ultimately, the Supreme Court found that creating subclasses was at least one of the required judicial means of ensuring fair and adequate representation in the factual and legal context of *Amchem*.[98]

Similarly, the Court's opinion in *Oritz v. Fibreboard Co.*[99] should be read as promoting increased judicial management and scrutiny of class actions, particularly in the settlement context under Rule 23(b)(1)(B).[100] *Oritz*, like *Amchem*, was an asbestos case, but with an

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problems of financial conflicts between class counsel and the class and the problems inherent in current fee calculation methods).

92. Rule 23(c)(4)(B) allows for subclassing, while 23(d) gives the court discretion to frame various orders, including discretionary notice under 23(d)(2) and decertification under 23(d)(4). Also, the certifying court may alter certification under 23(c)(1), must supervise provision of mandatory notice to under 23(c)(2), and must approve any settlement of class claims under 23(e). Subdivision 23(c)(3) allows the court, when issuing a final judgment, to define the class in a way that avoids challenges to the res judicata effect of the judgment.
93. *See* Oritz v. Fibreboard Co., 527 U.S. 815 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 612 (1997); Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367 (1996).
94. *See supra* notes 29-56 and accompanying text.
95. 521 U.S. 591 (1997).
96. *See id.* at 606-08.
97. *Id.* at 608.
98. *See id.* at 625-28.
99. 527 U.S. 815 (1999).
100. Rule 23(b)(1)(B) allows for a class action under the "limited fund" rationale. When a defendant does not have enough resources to compensate all injured par-

interesting twist: to prevent an adverse judgment from leading to bankruptcy, defendant Fibreboard was willing to settle under the limited fund rationale of Rule 23(b)(1)(B), provided the plaintiffs accepted the value of Fibreboard's liability insurance as the "limited fund" at stake.[101] When the case reached the Supreme Court, not only did the Court closely examine the history and policy behind 23(b)(1)(B)—a policy requiring that only properly constituted classes be certified[102]—but it pointedly criticized the trial court for its cursory treatment of the settlement:

> The record on which the District Court rested its certification of the class for the purpose of the global settlement did not support the essential premises of mandatory limited fund actions. It failed to demonstrate that the fund was limited except by the agreement of the parties . . . .[103]

The Court was especially troubled by the fact that the district court "simply accepted the $2 billion Trilateral Settlement Agreement figure as representing the maximum amount the insurance companies could be required to pay" without further inquiry into the accuracy of those figures.[104] In establishing this rigorous standard for judicial oversight of the 23(b)(1)(B) settlement, the *Oritz* Court seemed driven by the potential for abuse and the risk of inadequate representation during the settlement process, a point in the litigation at which the adversarial nature of litigation merges into a more accommodating state of negotiation.[105]

Implicitly or explicitly, the march of recent Supreme Court cases is toward a strict requirement: judicial control is essential to ensure that the interests of absentees are protected. This means that the presiding judge must closely examine the legal and factual postures of those within the putative class to determine their degree of correspondence. Beyond this, the judge must closely monitor the adequacy of representation by the class representative and class counsel. These factors determine the preclusive effect of a class action judgment—not, as *Shutts* could be read to suggest—the presence of personal jurisdiction.

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ties, a class judgment may be preferable to a set of individual judgments in which plaintiffs race to drain the finite resources of the defendant, leaving "late" plaintiffs with a judgment-proof defendant.

101. *See Oritz*, 527 U.S. at 828.

102. *See id.* at 832-37.

103. *Id.* at 848.

104. *Id.* at 851.

105. *See id.* at 838-41 (describing the possible intraclass conflicts of interest arising from lack of cohesion within the broad spectrum of plaintiffs which counsel purported to represent).

3. The Role of Notice

Notice[106] has several possible roles in class actions. First, in some class suits, namely those certified under Rule 23(b)(3), notice is required by the Rule itself. Second, in a limited number of cases where Rule 23 does not require notice, the Constitution's Due Process Clause may demand it.[107] Third, even though in some class suits notice may neither be a rule-based nor a constitutional requirement, it may nonetheless be a powerful instrument for effective judicial oversight of class cohesion and adequate representation. As such, it should be frequently employed.[108]

The efficacy of notice has been the subject of much debate. Some observers argue that notice does not in fact encourage actual participation of absentees in class litigation.[109] That is, the obstacles of

106. I use the term "meaningful notice" to describe notice with constitutionally sufficient content—notice that actually informs absent class members of their stake and their rights in the litigation. Suffice it to say that theoretically, a technically sufficient notice that "is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" does in fact exist. Mullane v. Cent. Hanover Bank & Trust, 339 U.S. 306, 314 (1950). It is this form of notice with which I am concerned here.

107. The *Mullane* Court stated:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

339 U.S. at 313. Also, the leading case of *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175-77 (1974), proceeds on the theory that notice is a requirement of due process even in cases where individual claims are small and few members may in fact elect to opt out, because only individualized notice may afford unnamed class members the *opportunity* to withdraw from the representation. The opportunity to opt out concerned the Court very much, both from a constitutional standpoint and from the standpoint of what Rule 23 requires. Despite the Court's due process concerns, however, its decision was based on the language of Rule 23.

108. A proposed amendment to Rule 23 would make notice mandatory in all class actions. *See* FED. R. CIV. P. 23(c) (Class Action Subcomm., Advisory Comm. on Civil Rules, Proposed Rule 2001).

109. Many commentators have criticized the effectiveness of notices currently employed in federal class litigation. *See, e.g.*, Edward H. Cooper, *The (Cloudy) Future of Class Actions*, 40 ARIZ. L. REV. 923, 943 (1998); George Rutherglen, *Better Late than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 267-68 (1996) (asserting that notice is much less effective as a practical matter when notice is, customarily, sent early on in the proceedings to class members before they understand the value of their claims and the adequacy of their representation); Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 134 (1996) (arguing that notices are ineffective generally because they are too technical for the lay reader to comprehend). However, neither the sufficiency of actual notice content nor the rate at which notice spurs absent class members to intervene, object, or make collateral attacks is my concern.

reading and understanding the notice and then taking action (such as objecting to the adequacy of representation) often overpower in practice the theory that underlies at least some class notices. It is important, however, to take close account of the various roles that notice plays under Rule 23. First, the mandatory notice applicable in Rule 23(b)(3) actions, of course, allows the absentee to opt-out and advises the absentee of her right to enter an appearance.[110] Second, in the event of a proposed settlement, mandatory notice under Rule 23(e) permits the absentees to be heard as to the fairness and adequacy of the settlement terms. Third, discretionary notice under Rule 23(d)(2) may have a variety of practical and managerial purposes, such as allowing the court to gather additional information regarding the size, strength, and cohesion of the class claims. Taken together, the various notice provisions of Rule 23 not only promote sound judicial administration, but also respond to constitutional concerns.

In representative suits, notice performs at least some functions that differ from notice in traditional adversarial suits. In a perfectly cohesive class action, with vigorous representation throughout, notice to the representative would be the equivalent of notice to the class. But, as a practical matter, such cohesion seldom exists. Generally speaking, in class suits the constitutional requirement of notice is inversely related to the cohesiveness of the class.[111] As previously remarked, classes certified under 23(b)(3) are typically the least cohesive; thus, the drafters of Rule 23 provided mandatory notice to (b)(3) absentees. Although Rule 23 does not expressly state that the remedy sought is invariably the proxy for determining which provisions of the Rule govern certification, most courts consider the remedy demanded as the determinant of whether a class may be certified under one of the "mandatory" subsections or, alternatively, under subsection (b)(3) with its option for exclusion.[112] It is of course possible that a highly cohesive (b)(3) class could be formed. Class members might be so closely knit that the court would have little concern that

110. In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

FED. R. CIV. P. 23(c)(2).

111. This inverse relationship makes sense if notice is viewed as a primary means of ensuring adequacy of representation.

112. *See* Robert L. Serenka, Jr., Annotation, *Propriety of Allowing Class Member To Opt Out in Class Action Certified Under Subsections (b)(1) or (b)(2) of Rule 23 of Federal Rules of Civil Procedure*, 146 A.L.R. FED. 563, §§ 2, 3 (1998).

the interests of the entire membership were adequately represented, assuming the class representative vigorously prosecuted the class claims. Notice would not be constitutionally demanded in such a suit, even though Rule 23 requires notice and an opportunity to leave the class. Nonetheless, such cases are likely to be rare, and the use of a remedial distinction to sort mandatory from non-mandatory classes, though imperfect, appears to work fairly well in practice.

Classes certified under subsections (b)(1) and (b)(2), which typically are closely knit, are (except for settlement) subject only to discretionary notice as specified by the court.[113] These discretionary notices will seldom be required by due process, since most (b)(1) and (b)(2) classes are sufficiently cohesive to meet constitutional requirements.[114] Nonetheless, notice can be a useful managerial tool. Of course, when the class plaintiffs seek not only equitable relief, but damages as well, class cohesion becomes more problematic, at least with respect to damages. A uniform damage award across all class members is often inappropriate, and, to the extent damages are individualized, class cohesion suffers proportionately. In general, however, Rule 23 and its state counterparts satisfy the constitutional standard of notice because class actions in which damage awards predominate should be certified under subsection (b)(3). Notice is mandatory in all (b)(3) classes and, of course, unnamed (b)(3) class members can take protective action by excluding themselves.

As previously observed, Rule 23 mandates notice in all class action settlements.[115] Although seldom discussed by either courts or commentators, notice may be constitutionally required when a settlement is tendered because the risk that the adversarial force of the relationship between the named party and the opposing party has weakened or collapsed during settlement negotiations. Of equal importance is the fact that there is a high probability of divergent views within the class on the central issue of whether the settlement is fair and adequate. Whatever cohesion may have existed when claims (or defenses) were pushed forward in an adversarial context may be weakened or shattered during the more conciliatory dynamics of settlement. Settlement is necessarily an accommodative step—an agreement is formed between the class representative and her adversary in which counsel on both sides take a leading role. But in class actions, counsel is not subject to the same client control as is counsel in individual suits: the "client" to which class counsel is accountable is usually amorphous and widespread. Counsels' fees, seldom discussed openly during negotiations, often drive the concessions that lead to settle-

113. *See* FED. R. CIV. P. 23(d)(2); sources cited *supra* note 109.
114. Discretionary notice, however, may provide the court a way to monitor the continuity of adequate representation. *See infra* note 117 and accompanying text.
115. *See* FED. R. CIV. P. 23(e).

ment. Moreover, there are indications that class settlements are increasingly suspect because of possible collusion between plaintiff and defense counsel.[116] Notice and an opportunity to be heard are probably constitutionally required in the context of settlement agreements offered for court approval precisely because class cohesion has weakened and adequacy of representation has become fragile and uncertain. In any event, neither judges nor commentators have given sufficient attention to the degree to which the representative adversarial model is likely to be weakened in the class action settlement context. During settlement, the cohesion that is so often identified with each party to a winner-takes-the-spoils conflict begins to fragment and dissolve.

It should be noted that both mandatory and discretionary notice may have important aims in addition to alleviating concerns about the constitutional rights of absentee class members. For example, notice may serve to inform the court of the degree of class cohesion, the desirability of creating subclasses, the fairness of a proposed settlement, or the appropriateness of certifying specific claims or issues. Although these matters are potentially of constitutional dimension, they are also components of Rule 23. Thus, notice may have value not only to absentees, but also to courts in that responses to interim notice provisions help illuminate managerial decisions by the presiding judge.[117]

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116. *See generally* Koniak & Cohen, *supra* note 74; *see also* Coffee, *supra* note 74, at 1373; *Developments in the Law—The Paths of Civil Litigation* (pt. 4), 113 HARV. L. REV. 1806, 1811 (2000); Susanna M. Kim, *Conflicting Ideologies of Group Litigation: Who May Challenge Settlements in Class Actions and Derivative Suits?*, 66 TENN. L REV. 81, 123-24 (1998). Note that the Advisory Committee's Class Action Subcommittee has recently proposed changes to Rule 23(e) that are aimed to strengthen judicial review of class action settlements and take into account collusion concerns. In particular, the Subcommittee focuses on the relative control of class members versus class counsel of the settlement process. The notes to Proposed Rule 23(e)(1)(C) suggest that factors to be considered include:

> the extent of participation in the settlement negotiations by class members or class representatives, a judge, a magistrate judge, or a special master; the number and force of objections by class members; . . . [and] the reasonableness of any provisions for attorney fees, including agreements with respect to the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objector . . . .

FED. R. CIV. P. 23(e) (Class Action Subcomm., Advisory Comm. on Civil Rules, Proposed Rule 2001).

117. In fact, several sources have suggested that notice is meant to provoke attention to the vigor of representation in a class suit. The Advisory Committee's notes state that notice "permits members of the class to object to representation." FED. R. CIV. P. 23 advisory committee note; *see also* Leslie W. O'Leary, *Mass Tort Class Actions: Will* Amchem *Spawn Creative Solutions?*, 65 DEF. COUNSEL J. 469, 477 (1998) (asserting that that the rulemakers intended for mandatory notice in (b)(3) actions to provide a way of ensuring adequate representation in addition to an opportunity to opt out of the suit altogether). Patrick Woolley, in *Rethinking the Adequacy of Adequate Representation*, 75 TEXAS L. REV. 571, 583 (1997),

4. The Role of Opting Out

Professor John Coffee has cogently pointed out the available means of protecting unnamed class members: voice (participation in the class action), loyalty (effective representation by named parties), and exit (electing to leave the class).[118] Opting out, coupled with mandatory notice, is an important measure to protect absent class members in actions that are unlikely to be highly cohesive. This procedure for exclusion is, of course, a mandatory feature of class certifications under Rule 23(b)(3). Specifically, Rule 23(c)(2) requires notice to unnamed members of a (b)(3) class, informing them of their opportunity to exit the class. Those who decline to do so are bound by a judgment for or against the class.[119]

It is important to analyze closely the role played by the notice and opt-out provision of Rule 23(c)(2) and its state counterparts. In *Phillips Petroleum Co. v. Shutts*,[120] the Supreme Court suggested that this provision secured personal jurisdiction over unnamed plaintiff class members who failed to exclude themselves from the class action. In short, those who chose to remain in the class consented to personal jurisdiction.[121] It is difficult, however, to accept the proposition that a court can confer upon itself jurisdiction over absentees simply by directing a notice that, if unanswered, yields jurisdictional power.[122] In ordinary litigation, there is no instance in which a defendant is brought within a court's personal jurisdiction by the simple failure to respond to a summons or other document from the court. Such a rule would very likely be unconstitutional. Rule 4 of the Federal Rules of Civil Procedure, for example, allows waiver of the formal service of process, but it still requires the recipient to make affirmative contact with the court to extend the court's jurisdiction over the non-resi-

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notes, however, that notice the *Mullane* opinion describes as "reasonably calculated, under all circumstances, to apprise interested parties" is not necessarily notice that ensures adequate representation, or else the court would have called it "notice reasonably calculated to assure adequate representation." Thus, Professor Woolley argues, notice has an independent value in the due process matrix. Nonetheless, it is plausible that the notice described in *Mullane* does help assure adequate representation, since apprising interested parties and their representatives in the litigation is the only way to give them an opportunity to object to their posture through opting out or intervention.

118. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000).

119. *See* FED. R. CIV. P. 23(c)(2); American Pipe & Constr. Co. v. Utah, 414 U.S. 538, 547 (1974); 18A WRIGHT ET AL., *supra* note 56, § 4455.

120. 472 U.S. 797 (1985).

121. *See id.* at 812-13.

122. *See* Wood, *supra* note 16, at 620-21. Of course, an opt-in provision could serve as an instrument of jurisdiction by consent. But in a properly certified class, personal jurisdiction over the class representative suffices.

dent.[123] The Advisory Committee in fact explicitly rejected the idea that a court could extend personal jurisdiction over a non-resident defendant merely through his failure to respond to mailed service.[124] While it is true that personal jurisdiction can, for example, be acquired through a consent transmitted by mail, the defendant must affirmatively register her submission to this territorial jurisdiction.[125]

Realistically, the notice and exclusionary provisions of Rule 23 operate to secure, by declination, the consent of unnamed class members to be represented by the named member(s) of the class. The issue of personal jurisdiction should turn not upon notice, but rather upon the relationship between the claims (or defenses) and factual postures of the class representative(s), on the one hand, and those of the unnamed members of the class, on the other. Note, also, that the consent given by inaction is a consent to be *adequately* represented as to the claims or defenses enumerated in the notice, which explains why a Rule 23(b)(3) absentee who does not opt out can still challenge, in a subsequent proceeding (or by intervention), the sufficiency of her representation in the class suit.

The drafters of Rule 23 very likely intended to coordinate the degree of class cohesion with the right of (b)(3) exclusion. Further, the drafters probably thought that the right to be excluded under subsection (b)(3) was nothing more than a right to withdraw from class representation. The Advisory Committee's notes suggest these premises, although the focus of the Committee is on individual interests. The note to subdivision (c)(2), the mandatory opt-out section applying to (b)(3) classes, states that

> the interests of the individuals in pursuing their own litigations may be so strong here as to warrant denial of a class action altogether. Even when a class action is maintained under subdivsion (b)(3), this individual interest is respected. Thus the court is required to direct notice to the members of the class of the right of each member to be excluded from the class upon his request.[126]

Not only does the opt-out provision help to compensate for the lack of cohesion typical of (b)(3) classes, it also, at least in theory, helps combat the increased risk, inherent in many (b)(3) actions, of inadequate representation. Such potential inadequacy results from both the increased probability of diverse claims and defenses and the heightened

123. *See* FED. R. CIV. P. 4(d).

124. *See* FED. R. CIV. P. 4 advisory committee note. The Advisory Committee changed the language describing waiver of formal process, no longer referring to waiver as "service-by-mail" because "[t]his language misled some plaintiffs into thinking that service could be effected by mail without the affirmative cooperation of the defendant. It is more accurate to describe the communication sent to the defendant as a request for a waiver of formal service." *Id.* (citation omitted).

125. See *Schultz v. Schultz*, 436 F.2d 635 (7th Cir. 1971), for a sample of cases raising the issue of whether defendants' actions amounted to an actual consent.

126. FED. R. CIV. P. 23 advisory committee note.

risk that the (b)(3) representatives may not have large individual claims, thus increasing the probability that they will lack an adequate incentive to monitor class counsel. That these concerns underlie the exclusionary provisions seems much more likely than the dubious assertion that the passive "consent" of absent class members yields personal jurisdiction.

In theory, and occasionally in practice, a class action certified under Rule 23(b)(3) is highly cohesive, rendering mandatory opt out *constitutionally* superfluous.[127] But, as noted earlier, the drafters of Rule 23 necessarily had to deal with practical generalities, and the application of a mandatory opt-out provision to all (b)(3) classes is a workable, if imprecise, solution.[128] While it is tempting to criticize the opt-out right as ineffective because relatively few absentees elect to withdraw from the class suit,[129] the frequent declination of this option is not necessarily an indication that the procedure is somehow constitutionally flawed. Although there are no hard data, it is quite plausible that a significant portion of those who decline to opt out choose this course of action because they have no intention of filing an individual suit. Thus, they have little or nothing to lose by remaining in a plaintiff class.

D. Challenging the Adequacy of Representation

The ultimate judicial corrective, fundamental to the representative model, is the provision for a challenge to the adequacy of representation by the class representative(s)—in practical terms the named class members and class counsel. Although an unnamed class member is entitled to appear before the court in a pending class action and contest the adequacy of representation, this intervention is not often feasible since it is likely to be costly, inconvenient, and time consuming. Furthermore, defects in the quality of representation may not be apparent to unnamed members of the class until the trial is in its latter stages or completed. Thus, for most absentees, a formal challenge after a final judgment is the only corrective to an unwarranted adverse class judgment. Some commentators have leveled sharp criticism at this restricted opportunity, noting that this ex post challenge, like intervention, faces formidable obstacles of timing and a heightened

127. *See supra* text accompanying notes 77 & 78.

128. According to Professor Newberg, "The Rules Advisory Committee's adoption of the opt out clause . . . showed its concern with the individual interests intrinsic to Rule 23(b)(3) class suits . . . ." 3 NEWBERG & CONTE, *supra* note 19, § 16.15.

129. THOMAS E. WILLGING ET AL., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 45-54 (1996).

standard of review.[130] Challenging adequacy is also likely to be burdensome and expensive, and the amount of the judgment against an individual class member may not justify the contest. Nevertheless, the basic constitutional principle has been to permit unnamed class members to challenge the adequacy of their representation in a collateral trial. If the court finds that the class (or certain members within it) was inadequately represented, the judgment as to the class (or individual within it) will be invalidated under the Due Process Clause.[131] The fact that absent class members are permitted a post-judgment attack on the outcome of a suit attests powerfully to the fact that adequacy of representation is a fundamental principle of class actions.[132]

Hansberry v. Lee, noted earlier,[133] is a compelling example of inadequate representation occasioned by conflicting interests within the class. There, certain landowners, purporting to represent an entire class of neighborhood residents, sued in Illinois state court to enforce a racially restrictive covenant. Upholding the covenant, the court issued a decree, the validity of which became important in a subsequent suit to enforce the restrictive covenant against the Hansberrys. In the latter suit, the Hansberrys argued that the earlier suit sustaining the validity of the covenant had no preclusive effect on them.[134] The United States Supreme Court agreed, noting that

> [b]ecause of the dual and potentially conflicting interests of those who are putative parties to the agreement in compelling or resisting its performance, it is impossible to say, solely because they are parties to it, that any two of them are of the same class. Nor without more, and with due regard for the protection of the rights of absent parties which due process exacts, can some be permitted to stand in judgment for all.[135]

Hansberry thus supports the principle that a post-judgment attack on the adequacy of representation, even if not ideal, is a constitutionally mandated means of securing the due process rights of class absentees. It further stands for the proposition that a significant divergence of

130. *See* Downs, *supra* note 1, at 707-08; Koniak & Cohen, *supra* note 74, at 1117 n.213.

131. Professor Woolley asserts that adequacy of representation and due process are not equivalent. *See* Woolley, *supra* note 117, at 572. Professor Woolley argues that a class member, to have full access to due process, must be able to intervene in the suit and secure his individual day in court if he so wishes. *See id.* at 573.

132. Finality, or res judicata, is such an important guiding principle of our legal system that its disruption is a powerful statement. In *Tice v. American Airlines, Inc.*, 162 F.3d 966, 970 (7th Cir. 1998), the Seventh Circuit noted that the virtual representation doctrine, which stands at the outer reaches of representative litigation, highlights the tension between "the right . . . of each individual to assert her own claim; and the need of litigants and the judicial system alike for finality of decision after a full and fair airing of a matter."

133. *See supra* note 48 and accompanying text.

134. *See Hansberry*, 311 U.S. 32, 38 (1940).

135. *Id.* at 44.

interest among class members or between class members and the class representatives necessarily thwarts adequate representation.

While some commentators have described adequacy of representation in terms of procedural due process and even notions of "participation values,"[136] courts have identified various concrete, practical factors that are essential features of adequate representation. These include, for example, vigorous prosecution by the named parties and class counsel, minimum knowledge of the case (by class representatives),[137] ability to finance the suit, competency of class counsel, and, of course, an absence of conflicts of interest.[138] It seems plain enough that representation will be insufficient if there is a significant divergence between the legal and factual postures of the representatives and those of the class or some members within it. Concerns about adequacy of representation are more pressing in the class context than in traditional representative suits, where typically there is a preexisting relationship between the representative and the represented, the number of persons represented is comparatively small, the persons represented are usually well informed about the litigation, and the representative is not asserting his own claims.[139] At the core of adequacy of representation in the class context, however, are three principal features: sufficient cohesion between representative and the entire class (or subclass), competency of class counsel, and continuous vigor in the prosecution (or defense) of the suit. If any of these essential components is absent as to one or more unnamed class members, the resulting judgment is constitutionally defective and should not bind them.

E. Binding Absent Defendant Class Members

The conditions under which absent defendant class members can be bound has proven to be a controversial and vexing question.[140] In-

136. *See* Woolley, *supra* note 117, at 596-97.

137. *See* Panzirer v. Wolf, 663 F.2d 365, 368 (2d Cir. 1981); Epifano v. Boardroom Bus. Prods., Inc., 130 F.R.D. 295, 301 (S.D.N.Y. 1990); Amswiss Int'l Corp. v. Heublein, Inc., 69 F.R.D. 663 (N.D. Ga. 1975).

138. *See* ROBERT H. KLONOFF, CLASS ACTIONS AND OTHER MULTIPARTY LITIGATION §§ 3.23, 3.24, 3.25, 3.26, 3.27, 3.29 (1999).

139. To understand how adequacy of representation is of special concern in the class action context, consider the unusual situation in which a pro se litigant seeks to represent a class. In *Oxendine v. Williams*, 509 F.2d 1405 (4th Cir. 1975), the Fourth Circuit found that a pro se litigant, because he is a layman, cannot adequately represent a class of prisoners in a (b)(2) action, thus putting their rights at stake. The class action context clearly requires special protections to maintain the representational model which separate it from other kinds of litigation. *See supra* section III.A.

140. Other commentators have broached this issue, expressing a great deal of concern. *See* Wood, *supra* note 16, at 607-18; Note, *Defendant Class Actions*, 91 HARV. L. REV. 630 (1978).

tuitively, the idea of binding absent class defendants is disquieting, first, because procedural law treats plaintiffs and defendants differently[141] and, second, because the incentive structure of class actions could topple in a defendant class. An example of the latter difficulty is the oft-cited problem of the reluctant defendant class representative named against her wishes to defend the class.[142] There is also, at least in theory, the problem of the unnamed class member who learns, only after trial, that she has suffered an adverse judgment. Nonetheless, using the representative model as the appropriate framework brings defendant class actions into clearer perspective. The question to be asked is whether the dictates of Rule 23 will adequately protect the members of the defendant class so as to produce a binding judgment.

It is important to note, first, that Rule 23, which embraces the representative model, also explicitly contemplates defendant class actions. Both section (a), which outlines the prerequisites of any class suit,[143] and subsections (b)(1) and (b)(3) feature language indicating that the drafters envisioned maintenance of defendant class actions.[144] Because categories (b)(1) and (b)(3)—but not (b)(2)—contain explicit references to making a defense to claims against the class, a debate has arisen among commentators and within the courts as to

141. For example, the most basic framework of the civil suit is that the plaintiff has the burden of proof rather than the defendant, except when the defendant is in the plaintiff's posture when offering a counterclaim or an "affirmative" defense.

142. Professor Elizabeth Brandt remarks that a defendant's "unwillingness to serve in a representational capacity" may well threaten the adequacy of representation of absent defendant class members, since they would be unlikely to engage in a vigorous defense. Elizabeth Barker Brandt, *Fairness to the Absent Members of a Defendant Class: A Proposed Revision of Rule 23*, 1990 BYU L. REV. 909, 921. At the same time, however, a willing defendant representative may also be suspect, because willingness to defend may indicate collusion with the plaintiff, who selects the defendant representative herself. *See id.*; *see also* Debra J. Gross, Comment, *Mandatory Notice and Defendant Class Actions: Resolving the Paradox of Identity Between Plaintiffs and Defendants*, 40 EMORY L.J. 611, 624 (1991); Robert E. Holo, Comment, *Defendant Class Actions: The Failure of Rule 23 and a Proposed Solution*, 38 UCLA L. REV. 223, 232-33 (1990).

143. Rule 23(a) states that "one or more members of a class may *sue or be sued* as representative parties on behalf of all only if [four prerequisites are certified]." (emphasis added).

144. Rule 23(b)(1) allows for class treatment if "the prosecution of separate actions *by or against* individual members of the class" would cause inconsistent standards of behavior or deplete a limited fund the entire class is entitled to. (emphasis added). Rule 23(b)(3)(A) offers that one important factor courts should consider in their certification decisions include "the interest of members of the class in individually controlling the prosecution or defense of separate actions." (emphasis added).

whether Rule 23(b)(2) permits defendant class actions.[145] That the allowance of defendant class actions was not a subject of pointed debate among the drafters of (b)(2) or any other Rule 23 provision, however, may well reflect the uniform historical acceptance of defendant class actions. Not only were defendant class actions common in early English group litigation,[146] but they were also some of the earliest notable American class actions.[147] At any rate, it is not surprising that Rule 23 seems broadly to contemplate defendant classes.

An important feature of Rule 23's inclusion of the defendant class action is its apparent indifference to whether a particular class is made up of plaintiffs or defendants: its provisions apply to any class, regardless of its litigating posture. As noted earlier, in light of the differences between plaintiffs and defendants usually found in procedural rules, such symmetry seems, at first blush, to be misplaced. In practice, however, defendant class actions should rarely pose a special concern, particularly if courts acknowledge and respect the representative model. Indeed, very few defendant class actions are filed under any category, and even fewer are certified.[148] Certification under Rule 23(b)(3) is understandably rare,[149] since the mandatory opt-out provision would shatter maintenance of the class. Few plaintiffs would seek certification under (b)(3) only to have most, if not all, defendants leave the class. Thus, certification of defendant classes most often occurs under (b)(1) or (b)(2), with (b)(2), at least traditionally, being the most common certification category.[150] That said, however, the Fourth, Sixth, and Seventh Circuits have now construed Rule 23(b)(2) so as to disallow completely the certification of defendant classes under that subsection.[151]

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145. Professor David H. Taylor describes the terms of the debate in *Defendant Class Actions Under Rule 23(b)(2): Resolving the Language Dilemma*, 40 U. KAN. L. REV. 77, 85-107 (1991). *See also id.* at 81 n.17, 83 & n.19.

146. Professor Hazard notes that unincorporated associations found themselves in either procedural posture in eighteenth century English group litigation. Hazard et al., *supra* note 26, at 1874.

147. *See, e.g.*, Smith v. Swormstedt, 57 U.S. 288 (1853); *Ex parte* Wall, 107 U.S. 265 (1883).

148. *See* Comment; *Defendant Class Actions and Federal Civil Rights Litigation*, 33 UCLA L. REV. 283, 288, 296-317 (1985).

149. For an example of (b)(3) defendant class certification, see *Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980), which involved a defendant class of common carriers that had overcharged its customers in violation of federal regulations. As to the applicability of the language of amended Rule 23, see *supra* note 144.

150. *See* 1 NEWBERG & CONTE, *supra* note 19, § 4.64 (noting that (b)(2) defendant classes often involve claims against public officials and other "semiautonomous" public bodies, such as local courts).

151. *See* Henson v. E. Lincoln Township, 814 F.2d 410, 414-17 (7th Cir. 1987); Thompson v. Bd. of Educ., 709 F.2d 1200, 1203-04 (6th Cir. 1983); Paxman v. Campbell, 612 F.2d 848, 854 (4th Cir. 1980).

Defendant classes are so rare that despite the due process concerns they pose in theory, these suits seldom occupy the forefront of constitutional difficulties.[152] The Supreme Court has encountered only eight defendant class actions certified under amended Rule 23,[153] and the various courts of appeals have entertained only a negligible number compared to the far greater number of plaintiff class actions. Even if Rule 23's plaintiff-defendant symmetry might in theory permit the unconstitutional certification of a defendant class, it is unlikely that a "properly certified" class (under Rule 23) will be unconstitutional. Perhaps the remoteness of this possibility helps explain why the Supreme Court, in its few cases involving defendant classes, has merely acquiesced in the existence of a defendant class as long as the prerequisites of Rule 23 are satisfied.

In *Bazemore v. Friday*,[154] for example, the Fourth Circuit had refused to certify a class of defendant North Carolina counties accused of race discrimination in the administration of local agricultural extension services and 4-H clubs.[155] The court found that no "standardized practice" existed by virtue of a statewide rule, and thus plaintiffs failed to satisfy the requirements of Rule 23(b)(1)(B).[156] The Supreme Court affirmed the ruling, but neither explicitly endorsed nor questioned the constitutionality of defendant class actions. In fact (and not surprisingly), no facial constitutional challenge to Rule 23's allowance of defendant class actions has reached the Court and, more importantly, neither has a contextual challenge to a lower court's certification of a defendant class under Rule 23(b)(2) been successful in the highest court. Perhaps this paucity of authority is because most defendant class actions that have come before the Supreme Court and various courts of appeals have been tightly knit, thus tending to restrict or foreclose serious due process concerns, at least where the vigorousness of representation was carefully monitored by the trial judge. In one case, a class of public officials was alleged to have acted in their official capacity so as to contribute to the same injury against a class of plaintiffs. The certification of the defendant class was approved under Rule 23(b)(2).[157] It will thus be seen why one common

152. *See* Note, *supra* note 140, at 638-50 (discussing fairness concerns regarding both absent defendant class members as well as defendant class representatives).

153. *See* Bazemore v. Friday, 478 U.S. 385 (1986); Diamond v. Charles, 476 U.S. 54 (1986); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1 (1979); Sec'y of Pub. Welfare v. Inst. Juveniles, 442 U.S. 640 (1979); Zablocki v. Redhail, 434 U.S. 374 (1978); Trainor v. Hernandez, 431 U.S. 434 (1977); Gerstein v. Pugh, 420 U.S. 103 (1975); Gonzalez v. Automatic Employer Credit Union, 419 U.S. 90 (1974).

154. 478 U.S. 385 (1986).

155. *See id.* at 389, 392-93.

156. *See id.* at 406.

157. *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (acquiescing to a defendant class of county clerks from Wisconsin by affirming a district court ruling against them).

form of the defendant class action is exemplified by the so-called "prisoner's suit," wherein a single prisoner or class of prisoners typically challenge the constitutionality of correctional facility policies by naming as class defendants the officers who implement these policies.[158] Because correctional officers usually implement common policies, a plaintiff prisoner seeking injunctive relief can often maintain his suit as a class action. Similarly, citizens of a particular state sometimes lodge statutory challenges against state officials and obtain a defendant class certification under Rule 23(b)(1)(A).[159]

Typical suits against public officials differ significantly from the factual and legal pattern in *La Mar v. H & B Novelty & Loan Co.*[160] There, the Ninth Circuit consolidated on appeal two similar actions involving consumer rights and unfair, industry-wide practices.[161] One of the lower courts framed the problem in *La Mar* as that of the standing of the named class plaintiffs to sue the defendant class on behalf of all plaintiffs when each named plaintiff was allegedly injured by only one of the *named* defendants in each suit.[162] The Ninth Circuit, however, concentrated on the prerequisites of Rule 23 and determined that the structure of these two class actions did not fulfill the standards of typicality of representation. In the court's view, it was decisive that many members of the class had no claim against the defendant(s) singled out by their class representative for the assertion of her claim.[163]

One should not conclude, however, that a faithful application of the prerequisites of Rule 23 renders the defendant class action extraordi-

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In fact, it is generally accepted that a suit for injunctive relief is maintainable against a class of local public officials when the plaintiff seeks to invalidate a statute on its face or seeks to change a statewide administrative policy. *See* 6A FEDERAL PROCEDURE § 12:205 (Russell J. Davis & Wayne F. Foster eds., Lawyers ed. 1989); 1 NEWBERG & CONTE, *supra* note 19, § 4.65; *see also* Monaco v. Stone, 187 F.R.D. 50, 65 (E.D.N.Y. 1999).

158. *See, e.g*, Gerstein v. Pugh, 420 U.S. 103 (1975); Timm v. Gunter, 917 F.2d 1093 (8th Cir. 1990); Marcera v. Chinlund, 595 F.2d 1231 (2d Cir. 1979); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970).

159. *See, e.g.*, Nat'l Broad. Co. v. Cleland, 697 F. Supp. 1204 (N.D. Ga. 1988); CBS, Inc. v. Smith, 681 F. Supp 794 (S.D. Fla. 1988). On the other hand, unrelated patterns of discrimination would dilute the cohesion necessary for a defendant class. *See* Bazemore v. Friday, 478 U.S. 385 (1986).

160. 489 F.2d 461 (9th Cir 1973).

161. *See id.* at 462-63.

162. *See id.* at 463.

163. The Ninth Circuit stated:

> Obviously [the typicality] requirement is not met when the 'representative' plaintiff never had a claim of *any* type against *any* defendant . . . . We believe that this prerequisite is also lacking when the plaintiff's cause of action, although similar to that of other members of the class, is against a defendant with respect to whom the class members have no cause of action.

Id. at 465.

nary, or that the existence of a defendant class action alters the application of Rule 23. In *La Mar*, for example, the court of appeals simply upheld the intent of the drafters concerning the prerequisites of a proper class after two district courts within the circuit had disputed whether there ought to be an "exception" to Rule 23's requirement that each defendant be causally linked to each class member's injury.[164] Although the named plaintiffs in *La Mar* were eager to prosecute on behalf of all class members, most of the unnamed members did not have "typical" claims against the members of the defendant class.[165]

If courts are careful to ensure a great measure of cohesion in defendant class actions, the "*Shutts* dilemma" of personal jurisdiction should not arise even though some members of the defendant class have no significant contacts with the forum state. Again, experience and practicality tend to overshadow theoretical difficulties: it is rare that a case will arise in which unnamed defendant class members will be able to demonstrate that they do not have an adequate affiliation with the forum state. As noted, many defendant class certifications involve public officials—all of whom have minimum contacts with or presence within the forum state.[166] Nonetheless, it is important to ask the question whether a (b)(1) or (b)(2) suit could be properly certified if the defendant class contained out-of-state defendants over whom the court had no direct in personam jurisdiction. After all, the *Shutts* court pointedly remarked on the significant difference between plaintiffs and defendants when considering issues of personal jurisdiction.[167] Does this distinction mean that there is a sharp difference between plaintiff classes and defendant classes insofar as the effect of a judgment or decree on unnamed parties is concerned?

There would appear to be a *practical* difference between plaintiff and defendant classes if a judgment involves a damage award. The certification of a plaintiff class puts at risk each plaintiff's loss of a *potential* asset—realization of her claim. The certification of a defendant class puts at risk an immediate monetary loss for each individual in the class, thus (potentially) negatively altering her current finan-

164. *See id.* at 465-66.

165. *See id.*

166. *See supra* notes 157-59 and accompanying text. Many defendant class actions of other types, in fact, have absentee defendants that already satisfy the minimum contacts requirements. *See* Holo, *supra* note 142, at 245 n.92.

167. The *Shutts* Court stated, "Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985).

cial status.[168] In utilitarian terms, it is more disruptive to lose $1000 from one's current assets than it is to fail to realize a $1000 gain that is inchoate and problematic. Perhaps the *Shutts* Court was concerned about highlighting the differences between plaintiffs and defendants in (b)(3) actions because these actions are predominantly for money damages. Of course, Rule 23 diminishes many constitutional concerns in (b)(3) damage suits by providing for individual notice and an opportunity to opt out. Thus, under a proper application of Rule 23 the *Shutts* dilemma as applied to class defendants shrinks in importance. This follows from the fact that (b)(1) and (b)(2) actions, which seek predominately or exclusively equitable relief, differ in important respects from class actions certified under (b)(3).[169] As previously noted, (b)(1) and (b)(2) classes tend to be tightly knit, comparatively cohesive classes. Further, the relief granted typically compels members of a defendant class to conduct themselves in a lawful manner. At least, in cases where damages for past wrongdoing are not asserted, the equitable nature of (b)(1) and (b)(2) actions mollifies some of the due process concerns underlying defendant class actions. Of course, where damage claims predominate, certification must occur, if at all, under subsection (b)(3) with the accompanying option to leave the class.

There remains, however, the possibility of a suit against a defendant class that seeks predominately equitable relief, but also asserts a claim for damages. Here, the likelihood is strong that individual differences among class members would render the certification of a defendant class under either (b)(1) or (b)(2) inappropriate. However, in the rare case of sufficient class cohesion to enable (b)(1) or (b)(2) certifications, the representative model would dictate a binding "law-equity" judgment that embraced even those unnamed class members without a nexus to the forum state.

There is, however, a collateral point to be noted with respect to the enforcement of an equitable class judgment or decree. The point arises because of the interface between representative class actions and traditional restrictions in judicial power. Unless the named defendants, by virtue of their position or office, have directive authority

168. Of course, one's interest in a judgment is considered a "property interest" in the law of federal procedural due process, *see* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429-30 (1982) (discussing the property interest civil litigants have traditionally had in adjudicatory proceedings), but the difference between a class plaintiff and class defendant is one of degree, not that one has a property interest in the outcome of a lawsuit while the other does not.

169. Due process concerns surrounding equitable and legal relief differ substantially because equity allows courts to modify the terms of relief as circumstances change over time after entry of the judgment. This inherent flexibility may ease due process concerns, whereas relief in the form of damages consists of an immediate, unalterable, out-of-pocket loss to the defendant.

over the unnamed class members, it will be necessary to seek enforcement of the judgment or decree in a court that has personal jurisdiction over recalcitrant unnamed class members. The properly entered class judgment is binding on the absentee class member in the sense that she is subject to claim and issue preclusion, but, since equity "acts directly on the person," it seems clear that the enforcing court must have direct judicial authority over the person of unnamed (absent) defendants. Under traditional jurisdictional principles, and in the absence of a federal statute granting "nationwide" service of process, a forum court's ability to enter a direct order against unnamed class members (on pain of contempt) would not exist in the absence of affiliating contacts with the forum state. This position has received support from at least one federal court of appeals.[170]

Note, finally, that a valid damage judgment against an absentee class defendant should be enforceable in any jurisdiction in which she has assets. An absent defendant class member's claim that in personam jurisdiction was lacking in the initial action should be rejected on the ground that in a properly conducted class suit, personal jurisdiction over the class representative is the sole requirement for a binding judgment. On the other hand, as discussed below, the absentee should be able to advance a claim that she was inadequately represented, and, if that claim prevails, escape the binding effect of the class judgment.

IV. THE REPRESENTATIVE MODEL APPLIED TO OVERLAPPING ACTIONS AND CHALLENGES TO JUDGMENT

A. Anti-Suit Injunctions

Anti-suit injunctions barring nonforum claims by absent, unnamed class members pose a significant problem with the rise of nationwide class actions.[171] The issuance of anti-suit injunctions may cure some of the systemic problems of the class action. For example, the "race to judgment" or, in the settlement context, the "reverse auction" occurs when overlapping class actions, derived from the same transaction, are filed in different forums, and various class counsel compete to be the first to obtain a preclusive judgment or settlement, thus securing lucrative attorneys fees.[172] Anti-suit injunctions may prevent other problems, such as that of late-arriving class counsel who file in a different forum from the original class action (hoping to share in the fees of the first suit), and of the "migratory settler," who shops different

170. *In re* Gen. Motors Corp., 134 F.3d 133, 141 (3d Cir. 1998).
171. *See generally* Monaghan, *supra* note 1; Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 511-19 (2000).
172. *See* Coffee, *supra* note 70, at 370-73.

forums in search of a friendly court willing to certify an inadequate or unfair settlement.[173] If these various problems are neglected, the outcomes of many class actions are likely to be unsatisfactory—at least the result for individual class members will probably be less valuable than one obtained through an individual suit. In short, unless there is some means of controlling self-seeking activity that can frustrate the proper prosecution of a class action suit, the final result is likely to be distorted, thus frustrating both the class membership and the judiciary.

Nonetheless, broad anti-suit injunctions have the potential to violate the due process rights of absent class members.[174] The essence of an anti-suit injunction order is a direct judicial command intended to control individual behavior—that of one or more class members. Thus, to issue an effective anti-suit injunction against class action absentees, the court must have personal jurisdiction over them. The order from the court would be a personal directive requiring some basis of territorial power. If there is no basis for personal jurisdiction, such as contacts in the forum state, presence, or a federal statute or state rule of court, a judicial order should be ineffective as against absent class members—unless, of course, named class members have directive authority over absentees.

A second and equally serious problem arises when the class court ("*F1*"), using either an injunctive order or the doctrine of preclusion, purports to block challenges to the adequacy of representation that are lodged in a second forum ("*F2*"). Although a named class member represents the absentees regarding their claims in the class action forum, she does not represent the absentees with respect to claims that challenge the adequacy of representation in the class court. This principle, which expresses a fundamental limit on representative class actions, is more fully elaborated below.

B. Collateral Attack and the Extension of Personal Jurisdiction in the Class Context

Professor Henry Paul Monaghan has persuasively argued that the *Shutts* Court's use of an "implied consent rationale" as a vehicle of conferring personal jurisdiction over absentees who fail to opt out is

173. *See* Monaghan, *supra* note 1, at 1183. Professor Monaghan states that *Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir. 1993), provides a perfect example of the late-arriving attorney seeking to earn fees through extortion, while the leading case of *In re General Motors Corp.*, 134 F.3d 133 (3d Cir. 1993), exemplifies the "migratory settler" problem. *See also* Wasserman, *supra* note 171, at 486-87 (referring to the "migratory settler" problem as the "'repackaged' class action").

174. *See* Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514 (1996); Monaghan, *supra* note 1, at 1149-55; Wasserman, *supra* note 171, at 494-95.

misleading.[175] This fictional "consent" does no more than bind properly represented class plaintiffs to claim and issue preclusion relevant to their claims and defenses. Monaghan demonstrates that using the *Shutts* version of consent as a basis for enjoining suits in other jurisdictions poised to make a collateral attack upon the adequacy of representation in the class forum contradicts modern understandings of class actions, personal jurisdiction, and due process.[176] These views underscore how the dictum in *Shutts* can lead to basic doctrinal flaws.[177]

As noted earlier, opting out of (or remaining in) a class suit should not be characterized as an election regarding the forum court's jurisdiction, but rather should be viewed as withdrawing from (or remaining within) representation by the named class member(s). As previously stated, when there is sufficient cohesion within a class, the representative model does not require personal jurisdiction over absentees. In a (b)(3) class suit, which is often composed of loosely knit members, failure to opt out is not a consent to jurisdiction, but rather is an acquiescence to the representative character of the suit or, put otherwise, consent to be represented with respect to the claims and defenses asserted on behalf of the class. It follows, then, that when adequacy is challenged in *F2*, it is not enough for a court to say that failure to opt out binds an absent class member to the "jurisdiction" of *F1*. A challenge to adequacy rejects the sufficiency of the class representation, not the lack of judicial power when representation is adequate. An absent class member is always entitled to adequate representation, and it is irrelevant whether she is a member of the class through her failure to opt out or because she had no option to leave the class. Generally speaking, neither an injunction nor preclusion by judgment should be used to deny to an absent class member the right to challenge the adequacy of her representation. Moreover, a denial of this opportunity contravenes *Hansberry v. Lee*, which establishes that one can negate a class suit judgment on the ground of inadequate representation.[178] Put otherwise, if one is entitled to escape

175. *See* Monaghan, *supra* note 1, at 1178-79.

176. *See id.* at 1179. Professor Joan Steinman, in *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act*, 80 B.U. L. REV. 773 (2000), also rejects the idea that the All Writs Act could be used to enlarge the jurisdiction of federal courts to sufficiently enlarge personal jurisdiction to prevent collateral attacks in *F2*.

177. Professor Monaghan, however, appears to merge the distinctions between personal jurisdiction and procedural due process. He asserts that failure of personal jurisdiction is a failure of adequacy of representation, which amounts to a procedural deprivation. *See* Monaghan, *supra* note 1, at 1172-73.

178. 311 U.S. 32 (1940); *see supra* text accompanying notes 131-32. In *Hansberry v. Lee*, a clear conflict of interest existed between the representative parties and the unnamed class members. The Court determined that this conflict made it impossible for the unnamed class members to have their interests fairly represented in

the binding effect of a class judgment, it follows that one must have an adequate opportunity to achieve that escape.

The principle that any absentee class member should be able to collaterally attack a class judgment based on inadequacy of representation springs from a fundamental constitutional precept: the Due Process Clause secures one's right to have her day in court (either in person or by a suitable representative) before she can be subjected to a binding judgment.[179] A primary feature of collateral attack based on inadequacy of representation is that, by its nature, it is a claim that puts the absentee class member in an adversarial posture with respect to the class representative and class counsel. There is no defensible logic by which this attack should be foreclosed on the ground that the named party and class counsel have already represented (and foreclosed) the class members on this vital question. Typically, the representative and class counsel have incentives to defend the adequacy of their performance, especially when they have negotiated a settlement with the class opponent. The absentee who challenges the representative, therefore, should be allowed to have her day in court for the fundamental reason that on the issue of representational adequacy she usually has no adequate spokesman in the class suit. In the case of absentees outside the in personam jurisdictional reach of *F1*, the right to challenge representation includes choosing one's own forum.[180]

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court, and overturned the judgment. Several scholars, citing preclusion doctrine as support, suggest that another court should be unable to "relitigate" the question of adequacy of representation. *See, e.g*, Wasserman, *supra* note 171, at 495 ("In certifying the class . . . the court in the first class action already will have found that the representation was adequate. Given that finding, the court in the later action will have to determine whether the absent class members are barred, as a matter of issue preclusion, from relitigating the issue of adequacy of representation." (internal citations omitted)); Marcel Kahan & Linda Silberman, Matsushita *and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219 (suggesting that challenging adequacy in a collateral attack in another forum instead of raising it directly violates the principle of finality). In fact, it may be important to uphold a fairly conducted adversarial finding that representation was adequate after the entire suit was litigated, but because representation must be *continuous*, it cannot be said that the finding of adequacy rendered at the point of certification alone is enough to preclude another court from taking up the issue.

179. RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982).

180. This is not to say that anti-suit injunctions, in every situation, will violate the due process rights of absentees. For example, in *Hanlon v. Chrysler Corp.*, 150 F.3d 1011 (9th Cir. 1998), a federal district court in California had sought to enjoin a state court proceeding in Georgia by a man who purported to opt out of the federal action on behalf of all Georgia residents in the class. The federal action, which covered a nationwide class of consumers allegedly harmed by defective rear door latches on certain Chrysler mini-vans, was a consolidation of several suits. *Id.* at 1018. The Georgia "representative" ignored the injunction then issued by the court and filed for certification in Georgia, which was subsequently granted. *Id.* The *Hanlon* court affirmed the right of the federal court to issue the

Conversely, it should be constitutional for a class court to force those unnamed members within its personal jurisdiction to channel their inadequacy claims exclusively to the class forum, assuming, of course, there is a fair and adequate opportunity to litigate the issue there. That said, Professor Patrick Woolley makes the telling point that current procedural "rules and statutes do not require absent class members" to lodge their adequacy objections "in the class suit itself," nor is there current authorization for class courts to force unnamed members within their jurisdiction to do so.[181] Beyond this, Professor Woolley argues persuasively that *requiring* unnamed members to take an active role in the class suit in order to protect their interests is inconsistent with the representative model,[182] which is perhaps why the rules have no such requirement. Once an absent member is compelled to channel her adequacy objections into the class court, she no longer retains the privilege of a represented plaintiff who may sit back and allow the litigation to run its course under the guidance of the class representative and the class counsel.[183]

The general constitutional principle is that without an individual jurisdictional nexus to the class action forum, an unnamed member cannot be prevented from litigating, *in the forum of her choice*, due process challenges based on inadequate representation. Neither an injunction nor issue preclusion should block this challenge. It is important to differentiate issue preclusion as it pertains to the substance of an action, from issue preclusion that pertains to adequacy of representation. While preclusion by judgment generally applies to class actions, it does so only if the judgment is valid, and a valid judgment presupposes adequacy of representation throughout the class suit. The fact that a class is certified does not ordinarily involve a determination that representation has been adequate throughout the entire litigation. Certification normally takes place early in the litigation. Furthermore, even a determination of adequacy that is made at the conclusion of litigation (whether through settlement or trial) should not preempt a challenge by unnamed class members: they have not had their day in court either individually *or through an adequate representative* as to the vital issue of adequacy.[184] The representative

injunction staying the state court proceeding. *Id.* at 1024. This case is one in which an injunction is especially appropriate because the Georgia representative single-handedly sought to represent absent Georgians who were already, by all accounts, being adequately represented at the federal level.

181. Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 394 (2000).

182. *Id.* at 398-400.

183. *See id.* at 398.

184. *See, e.g.*, Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266 (7th Cir. 1998). In that case, Professor (now Judge) Diane P. Wood noted that due process violations based on inadequate representation could have been raised in the case

model fails here because there is a conflict between the representative and the represented. Perhaps it would be constitutionally permissible for the class court to adjudicate the adequacy question if the judge appointed representatives or guardians who have no conflict of interest and who are charged with the duty of showing that representation was inadequate.[185] It is not, however, the general practice to make such appointments.

In short, under existing principles the only way for a class court properly to gain a monopoly over the issue of adequacy is to have actual personal jurisdiction over unnamed class members and to issue an order pursuant to a statute or rule of court that channels adequacy objections into the class forum. Furthermore, the absentee must be accorded proper notice and an ample opportunity, often including discovery, to challenge representational adequacy. It would also appear that the sufficiency of representation must be challenged on an issue-by-issue basis, since adequacy of representation for one issue or set of issues (or for one subclass) within the suit does not necessarily mean adequacy on all issues (and all subclasses).[186] If the class court rejects entirely the challenge to representational adequacy, the only recourse for the class member who appears in the class suit is to appeal the ruling of the trial judge.

Consider in this context *Matsushita Electric Industrial Co. v. Epstein*,[187] where the Court faced a different problem: the preclusion of federal litigation by a state court judgment. The *Matsushita* class litigation began when shareholders of MCA, Inc. filed state law claims against both MCA and Matsushita following Matsushita's takeover of MCA.[188] The class suit was filed in a Delaware state court.[189] Shortly after suit was lodged, however, other shareholders filed federal claims against Matsushita in federal court alleging SEC violations.[190] While an appeal of the summary judgment granted to Matsushita by the federal district judge was pending in the Ninth Circuit, the Delaware court approved a class settlement which, in part, released all state and federal claims against Matsushita stemming

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as a means of defeating another forum's anti-suit injunction. *See id.* at 269, 275. There is, however, contrary authority. See *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189 (3d Cir. 1993), which is carefully reviewed in Monaghan, *supra* note 1, at 1182.

185. *See* Woolley, *supra* note 181, at 434 (suggesting that collateral attack be brought as a class suit itself).

186. Challengers to adequacy of representation do not have a carte blanche choice of forum, but this is not unusual in civil procedure, either. Note that in other situations, such as interpleader, a court can assert jurisdiction over a plaintiff against his will.

187. 516 U.S. 367 (1996).

188. *Id.* at 370.

189. *Id.*

190. *Id.*

from the acquisition.[191] Ultimately, the Ninth Circuit refused to allow release of the federal claims despite the apparently applicable provisions of the Full Faith and Credit Act.[192]

The Supreme Court reversed, determined that the Full Faith and Credit Act was dispositive, and suggested that the reach of judicial power to control litigation through res judicata in large nationwide class actions is appropriately broad.[193] Although the Court carefully noted the fact that the Delaware trial court issued personal notice to everyone bound in the class judgment, gave the plaintiffs in the California federal case an opportunity to opt out, and held a thorough hearing as to the fairness of the settlement, the Court also carefully noted that it was not deciding whether unnamed members of the class could challenge the adequacy of their representation.[194] The settlement at issue in *Matsushita* released federal claims both to encourage resolution of the dispute and to prevent repetitive litigation. The Supreme Court's affirmance of claim preclusion following the steps taken by the trial judge may be taken as an endorsement of strong judicial management in the class context, but it should not be read as approving the principle that a hearing by the class judge on the issue of adequacy forecloses challenges in *F2*. Indeed, several Justices, in separate opinions, expressly recognized the right of unnamed class members to mount such a collateral challenge.[195]

C. Enjoining Suits for Damages

Current judicial doctrine holds that the settlement of a class suit for injunctive or declaratory relief under Rule 23(b)(1) or (b)(2) does not preclude subsequent individual actions for damages.[196] In ordinary litigation, claim preclusion applies to all claims that were or could have been asserted. However, since unnamed class members have little or no control over either the class representatives or class counsel, their claims for damages, at least if they are substantial enough to warrant individual suits, must be actually and fairly liti-

191. *Id.* at 370-71.

192. *Id.* at 372. The Full Faith and Credit Act, 28 U.S.C. § 1738 (2000), provides that the "judicial proceedings" of a state "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."

193. *Matshusita*, 516 U.S. at 373-79.

194. *Id.* at 379 n.5.

195. *Id.* at 396 (Ginsburg, Stevens, Souter, JJ., concurring in part and dissenting in part); *cf. id.* at 387 (Stevens, J., concurring in part and dissenting in part).

196. Professors Wright, and others, explain the logic of this aspect of class action preclusion doctrine in their work. 18A WRIGHT ET AL., *supra* note 56, § 4455; *see also* Wasserman, *supra* note 171, at 489 (stating that *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867 (1984), implicitly assumes that "individual claims [for damages are] not barred by the doctrine of claim preclusion even though they [appear] to involve the same transaction or series of connected transactions").

gated to be precluded. In a class suit seeking entirely equitable relief, individual damage claims would not, of course, be tried. Nonetheless, issues common to equitable relief and damage claims might be fully and fairly tried if the class suit were actually litigated to judgment. In this event, the ordinary principles of issue preclusion should apply. Although a "settlement" judgment would not give rise to issue preclusion in the technical sense, the parties to the class action sometimes agree to particular resolutions of specified issues. Similarly, as part of the settlement agreement, the parties sometimes specify the forfeiture of certain claims, such as those for damages.

Thus, it is the settlement context that poses the greatest risk of an improper forfeiture of damage claims. Here, again, analysis under a modified representative model is illuminating. In *Colt Industries Shareholder Litigation*,[197] the New York Court of Appeals was faced with the problem of whether it could enjoin damage actions in other states that were based on the transaction at issue in the class suit. The New York litigation, which sought primarily but not exclusively equitable relief, had been terminated by a settlement.[198] The *Colt* court stated:

> [T]he trial court did err as a matter of law by seeking to bind an absent plaintiff with no ties to New York state to a settlement that purported to extinguish its rights to bring an action in damages in another jurisdiction. We reach this conclusion based on our consideration of the terms of the settlement reflected in the judgment, on our reading of *Shutts*, and on our belief that the Supreme Court in that decision intended to afford substantial protections to out-of-State plaintiffs in State class action suits.[199]

The court elaborated by noting that a claim for damages is a "distinct right" that cannot be "exacted as a price" for equitable relief in a settlement.[200] This characterization follows from the Supreme Court's description in *Shutts* that portrayed a damages action as a "property right."[201] Thus, the *Colt* court reasoned, before enjoining further damages actions, the lower court should have afforded absent plaintiffs the opportunity to opt out of the settlement.[202]

Analysis under a representational model supports this result, but invites a somewhat different line of reasoning. Attention should fall on the representational authority of the named class members in two respects. First, if individual damage claims are substantial, there is no reason to conclude that either the certifying court or the absent class members—including those within the court's territorial jurisdiction—expected the class representative to be empowered to forfeit the

197. 566 N.E.2d 1160 (N.Y. 1991).
198. *See id.* at 1166-67.
199. *Id.* at 1167.
200. *Id.*
201. *See id.*
202. *See id.*

individual damage claims in exchange for prospective, equitable relief to the class. In other words, the presumptive representational authority of the named plaintiffs was to *prosecute* the equitable and damage claims of the class. Representational authority should not be extended to embrace the representative's right to *bargain away* damage claims of sufficient magnitude to justify an individual suit. Although it may seem artificial to draw a distinction between a representative's authority to prosecute a damage claim and her ability to forfeit or compromise it as part of a settlement agreement, the difference is justified in the class action context. The reason is that the unnamed class members neither choose their representatives (including the class attorneys) nor do they exercise any control over them. There is the additional risk that individual damage claims may be substantially under-valued in the settlement context. And, as noted earlier, it is this context that poses the greatest risk of a schism between the absent class and its representatives, including class counsel. In settlement negotiations, adversarial postures become infused with the give and take of accommodation, increasing the risk that unnamed class members' claims for monetary relief will be forfeited by the class representatives and class counsel.

It is important, moreover, to understand that the relationship among absent class members, named class members, and class counsel functions quite unlike a traditional agency or representative relationship. A traditional fiduciary ordinarily does not have a stake in an outcome he affects by his representation of the principle. Further, a traditional agency relationship is usually consensual, in contrast to the judicially imposed relationship that positions the named class members and class counsel as surrogates of the entire class.[203] It would be hazardous and generally unrealistic for courts to treat class representatives as perfect agents or fiduciaries of the unnamed class members. Courts should be especially cautious in certifying damage claims for class treatment under (non-opt-out) mandatory classes, and usually should not permit substantial damage claims to be compromised without giving all unnamed class members the chance to exclude themselves. The right to opt-out should extend to in-state as well as out-of-state absentees because the presence or absence of personal jurisdiction is not the critical factor here. The controlling point is the unique nature of the relationship between the class representative and the body of persons that he and the class attorneys represent.

Second, although a class representative may be empowered to act with respect to declaratory and equitable claims common to the class, it does not necessarily follow that she is empowered to represent class members as to damage claims that are "common" to the class. A "hy-

203. *See* RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

brid" suit for damages arising out of the same transaction from which a (b)(1) or (b)(2) equitable action arises may well involve different and more individualized issues than the class action seeking only declaratory or injunctive relief. This is precisely why, as noted above, some class actions are certified only on specified issues within the totality of litigation.[204] The fact that the class may be less cohesive as to the damage claims (than as to the equitable claims) is further evidence that, generally, named plaintiffs should not be permitted to represent individual (unnamed) class members as to damage awards embraced in a proposed settlement agreement of so-called mandatory class actions.[205]

It is true, of course, that a class action would be more efficient if the forum could settle all class claims and also control the often disruptive collateral activity of unnamed class members. While devices such as injunctions and all-inclusive settlements may curb abusive behavior, they run counter to long-held principles limiting a forum court's authority and have the potential of harsh and unfair results.[206] Despite those traditional limits, proposed amendments to Rule 23 call for increased issue preclusion when a class court refuses to certify a proposed class[207] or declines to approve a proposed settlement.[208] Even more striking is a proposal that allows a class court to enter an order forbidding members of a *proposed* class from pursuing individual claims.[209] The historic tradition of the individual's right to

204. *See supra* notes 77-78 and accompanying text.

205. Courts are also informed by the principles controlling their own power over the proceedings of another tribunal. For example, in *Baker v. General Motors Corp.*, 522 U.S. 222 (1998), a Michigan court issued a nationwide antitestimonial injunction over a plaintiff as part of the class settlement in that case. The plaintiff was then subpoenaed to testify in a different case against GM in Missouri. In a unanimous decision, the Supreme Court held it would not accord full faith and credit to the injunction because the Michigan court could not "control proceedings against GM brought in other States . . . asserting claims the merits of which Michigan has not considered." *Id.* at 223. Thus, in addition to due process, considerations of power are important when a court must decide whether to issue an anti-suit injunction in the class context.

206. For example, under the doctrine of preclusion, a forum court cannot limit class members from litigating issues in other jurisdictions it did not fairly decide. Moreover, there is a long tradition of limiting the territorial jurisdiction of both state and federal courts.

207. FED. R. CIV. P. 23(c)(1)(D) (Class Action Subcomm., Advisory Comm. on Civil Rules, Proposed Rule 2001). The proposals cited in the text below, *infra* nn.208-10, are in "discussion" drafts. *See* Class Action Subcomm., Advisory Comm. on Civil Rules, Report of the Class Action Subcommittee, Agenda item 5 for the April 10-11 meeting of the Advisory Committee on Civil Rules (Mar. 28, 2000) (unpublished report, available from the Advisory Comm. on Civil Rules).

208. FED. R. CIV. P. 23(e)(5) (Class Action Subcomm., Advisory Comm. on Civil Rules, Proposed Rule 2001); *see supra* note 207.

209. FED. R. CIV. P. 23(g)(1) (Class Action Subcomm., Advisory Comm. on Civil Rules, Proposed Rule 2001); *see supra* note 207.

control the prosecution and defense of his own lawsuit, the unique nature of class action "representative" suits, and the limits placed upon a sovereign's judicial power should operate collectively to restrain the reach of the class action judge. Just as the nature of the representative actions dictates a departure from ordinary suits, so too, the nature of class actions dictates a departure from ordinary representative actions. Class representatives, who trace their authority to judicial appointment and acquiescence (rather than appointment by those they represent), should not have broad power to bind the class, but rather should be confined to limited, carefully monitored representation.

V. CONCLUSION

Class actions, like spring flowers (or autumn weeds) are bursting out all over. Their proliferation in state and federal courts has ushered in new challenges for the legal system. From the standpoints of history, constitutional doctrine, and practicality, the representative model of the class suit offers the most promising approach to resolving the vexing problems of the modern class action. Despite the criticisms leveled against the 1966 amendments to Rule 23, the drafters founded their work on the representative model, creating class action guidelines designed to take account of the differences between a class action and a traditional representative lawsuit. While it is true that modern class actions pose difficulties unforeseen by the rulemakers in 1966, the modified representative model is the most useful analytic tool for resolving current issues. Unfortunately, courts and commentators too often lose sight of this model, thus deflecting attention and analysis away from the proper underpinnings of modern class litigation.